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In The
Supreme Court of the United States

K&K CONSTRUCTION, INC., AND J.F.K. INVESTMENT COMPANY, L.L.C.,
Petitioners,

v.

THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND STATE OF MICHIGAN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Michigan Court of Appeals erred when it ruled that if the regulation at issue is "widespread", then the impacted property owner must show the "functional equivalent" of a full physical invasion to sustain an actionable regulatory taking, thus violating the settled Balancing Test rule of law in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

II. Whether the Michigan Court of Appeals erred when it ruled that the character of the government's action did not weigh in favor of a taking because the regulatory action provided a "reciprocity of advantage" which does not single out the Plaintiffs even though the statutory scheme of the regulation expressly allows just compensation for a taking.

PARTIES TO PROCEEDING

Petitioner

K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. [1]

Respondents

The Michigan Department of Environmental Quality and State Of Michigan.[2]

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[1] J.F.K. Investment Company, L.L.C. is successor in interest to J.F.K. Company, and Resorts and Company, a Michigan corporation.

[2] When this case started, the Michigan Department of Environmental Quality had the title Michigan Department of Natural Resources, referred to herein as the "DNR". The original Defendants were the State of Michigan and the DNR. The Defendants are now the State of Michigan and the Michigan Department of Environmental Quality (collectively "Defendants").

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PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Supreme Court, K & K Construction, Inc., J.F.K. Company and Resorts And Company ("Plaintiffs") pray that a Writ of Certiorari be issued to review the decision entered by the Michigan Court of Appeals and the Denial of Discretionary Review by the Michigan Supreme Court. *K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality*, 475 Mich. 856, 713 N.W.2d 268 (May 17, 2006), *K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality*, 477 Mich. 919, 722 N.W.2d 794 (October 31, 2006) and *K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality*, 267 Mich. App. 523, 705 N.W.2d 365 (2005)

OPINIONS BELOW

The Court of Claims' Opinion and Order dated November 2, 1992 finding a compensable taking. (Court of Claims Opinion and Order, Apx N1–N16).

The Court of Claims' Second Opinion and Order dated May 4, 1993 finding a compensable taking. (Court of Claims Opinion and Order, Apx M1-M11).

The Court of Claims' Judgment dated September 8, 1993 of $5,279,178 in favor of Plaintiffs in an amount of $5,279,178. (Court of Claims Opinion and Order, Apx L1-L7).

The Michigan Court of Appeals' Opinion dated June 4, 1996 affirming the Court of Claims' finding of a compensable taking. (*K&K Construction, Inc., J.F.K. Company, and Resorts and Company v. Department of Natural Resources,* 217 Mich. App. 56, 551 N.W.2d 413 (1996), Apx K1-K33).

The Michigan Supreme Court's Order granting application for leave to appeal. (*K&K Construction, Inc., J.F.K. Company, Resorts and Company v. Michigan Department of Natural Resources,* 454 Mich. 903, 562 N.W.2d 788 (1997), Apx J1-J3).

The Michigan Supreme Court's Opinion dated March 24, 1998 reversing the Michigan Court of Appeals and remanding to the Court of Claims on defined remand issues. (*K&K Construction, Inc., J.F.K. Company, and*

Resorts and Company v. Department of Natural Resources, 456 Mich. 570, 575 N.W.2d 531 (1998), Apx I1-I36).

This United States Supreme Court's denial of the Plaintiffs' Petition for Writ of Certiorari. (*K & K Construction, Inc., et al., v. Michigan Department of Natural Resources et al.*, 525 U.S. 819, 119 S.Ct. 60, 142 L.Ed.2d 47 (1998), Apx H1-H2).

This United States Supreme Court's denial of the Plaintiffs' Motion for Rehearing. (*K & K Construction, Inc., et al., v. Michigan Department of Natural Resources et al.*, 525 U.S. 1034, 119 S.Ct. 577, 142 L.Ed.2d 481 (1998), Apx G1).

The Court of Claims' Opinion and Order dated May 24, 2002 finding a compensable taking after trial on the remand. (Court of Claims Opinion and Order, Apx F1-F9).

The Court of Claims' Judgment dated September 30, 2002 for the Plaintiffs. (Court of Claims Judgment, Apx E1-E4).

The Michigan Court of Appeals' Opinion dated July 26, 2005 reversing the Court of Claims. (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v. Department of Environmental Quality*, 267 Mich. App. 523, 705 N.W.2d 365 (July 26, 2005), Apx D1-D63).

The Michigan Court of Appeals' Order Dated September 16, 2005 denying Plaintiffs' Motion for Rehearing. (Court of Appeals Order, Apx C1).

The Michigan Supreme Court's Order dated May 17, 2006 denying discretionary review. (*K & K*

Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality, 475 Mich. 856, 713 N.W.2d 268 (May 17, 2006), Apx B1-B2).

The Michigan Supreme Court's Order dated October 31, 2006 denying Plaintiffs' Motion for Rehearing. (*K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality,* 477 Mich. 919, 722 N.W.2d 794 (October 31, 2006), Apx A1-A2).

BASIS OF JURISDICTION

The Michigan Court of Appeals' Order reversing the trial Court of Claims' finding of a compensable taking is dated July 26, 2005. (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v. Department of Environmental Quality*, 267 Mich. App. 523, 705 N.W.2d 365 (July 26, 2005), Apx D1-D63). The Order of the Michigan Supreme Court denying the Plaintiffs' Application for Leave is dated May 17, 2006. (*K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality*, 475 Mich. 856, 713 N.W.2d 268 (May 17, 2006), Apx B1-B2). The Order of the Michigan Supreme Court denying the Plaintiffs' Motion for Reconsideration is dated October 31, 2006. (*K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality*, 477 Mich. 919, 722 N.W.2d 794 (October 31, 2006), Apx A1-A2).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (United States Constitution Amendment V.)

The Goemaere-Anderson Wetland Protection Act, MCL 281.701 et. seq. (MCL 281.701 et. seq., Apx Q1-Q56) was repealed and later reenacted as Part 303 of the Natural Resources and Environmental Protection Act – MCL 324.30301 et. seq.. ("Wetland Protection Act") (MCL 324.30301 et. seq. , Apx R1-R46).

STATEMENT OF THE CASE

A. BACKGROUND

1. In 1988, the Plaintiffs started a defined development of four contiguous parcels of property in Waterford Township, Oakland County, Michigan. ("Property")[3] In January of 1988, the DNR wrote an official letter to the Plaintiffs saying there are regulated wetlands within the Property. (Letter, Apx P1-P2). The DNR letter did not define the location of any wetlands. The DNR letter stated the need for a DNR Permit before constructing "**anything**" anywhere on the Property. The DNR letter referred to a map saying it was approximating the wetlands, but the DNR letter failed to even provide any such map.

2. On May 9, 1988, Waterford Township issued a Cease-and-Desist Order because it was informed by the DNR that there were wetlands "within the parcel". (Cease and Desist Order, Apx O1). The Waterford Township letter referred the Plaintiffs to the DNR saying until a DNR Permit is obtained, no work is allowed on the Property.

3. The Plaintiffs, at the request of the DNR and with input of the DNR, submitted engineered plans. The

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[3] The Property was made up of four parcels: parcel 1, parcel 2, parcel 3 and parcel 4.

DNR summarily denied the plans for development on any of the Property.

4. On December 29, 1988, the Plaintiffs filed suit in the Court of Claims seeking compensation under the Taking Clause of the Fifth Amendment of the United States Constitution and Michigan Constitution. After a full trial, the Court of Claims found a taking of all of parcel 1 of the Property and awarded Plaintiffs the amount of five million nine hundred forty-one thousand dollars ($5,941,000.00) plus interest, attorney fees and costs under the Michigan Mediation Rule.

5. Defendants then, on their own initiative and without input from the Plaintiffs, requested from the trial Court of Claims an opportunity to "mitigate". The Defendants now said the Plaintiffs could have limited development on the Property pursuant to the Goga Plan which was an engineered plan submitted by Plaintiffs. The Goga Plan was a compromise and fully engineered development plan submitted by the Plaintiffs but previously flatly denied by the DNR. The Court of Claims then ruled to incorporate the mitigation into the judgment and ruled to

reduce the net takings money award by $2,237,000.00 to the Plaintiffs.[4]

> "NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs are awarded judgment in that their property interest have been condemned by the application of the Wetlands Preservation Act and there has been both a complete taking and interim taking entitling Plaintiffs to just compensation accordingly." (Court of Claims Opinion and Order, Apx L2).

6. After the "reduced" judgment was entered, the Defendants then, on September 27, 1993, filed a blanket appeal on the entire judgment, including an appeal of the mitigation the Defendants sought, obtained and agreed to under the Goga Plan.

7. On June 4, 1996, the Michigan Court of Appeals "unanimously" affirmed the Court of Claims'

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[4]This is after the Trial Court ruled that the SEV limitation found in the wetland statute, as designed by the Michigan legislature, was an unconstitutional legislative provision unlawfully limiting just compensation. This ruling by the trial court was never upset on any of the appeals, including the appeal to the Michigan Supreme Court. The Trial Courts original net award was $5,941,181.00. The Final Judgment of the Trial Court, however, was a reduced net award of $3,245,256.00 when the DNR mitigated under the Statute, plus $1,574,522.60 in stipulated interest and $459,400.00 interim takings for a total of $5,279,178.00 was ultimately awarded pursuant to this Trial.

Judgment in favor of the Plaintiffs, found that a taking had occurred within the meaning of the Fifth Amendment and found that the Plaintiffs were entitled to just compensation.

> "Thus, a taking occurred within the meaning of the Fifth Amendment and plaintiffs were entitled to just compensation for the fifty-five acres of land affected by the regulation." (*K&K Construction, Inc., J.F.K. Company, and Resorts and Company v. Department of Natural Resources*, 217 Mich. App 56, 58, 551 N.W.2d 413 (1996), Apx K27).

8. On July 2, 1996, the Defendants appealed to the Michigan Supreme Court and the Michigan Supreme Court reversed and remanded the case back to the Court of Claims with very defined and limited remand instructions for trial.

9. On October 5, 1998, this United States Supreme Court denied the Plaintiffs' Petition for Writ of Certiorari. (*K & K Construction, Inc., et al., v. Michigan Department of Natural Resources et al.*, 525 U.S. 819, 119 S.Ct. 60, 142 L.Ed.2d 47 (1998), Apx H1).

10. On May 24, 2002, the Court of Claims, after another full trial, rendered its Opinion and Order on the binding remand issues. In addressing the first remand issue, the Court of Claims ruled factually that parcel three should be included in the denominator parcel. (Court of Claims Opinion and Order, Apx F1-F9). In addressing the second remand issue, the Court of Claims ruled that, after

applying the *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) "Balancing Test" to the testimony and evidence presented, there is a taking entitling Plaintiffs to just compensation. (Court of Claims Opinion and Order, Apx F1-F8).

11. On September 30, 2002, the Court of Claims issued a judgment in favor of the Plaintiffs in the amount of $16,486,228.00, which includes substantial statutory interest given the time since filing the Complaint as allowed by Michigan law. (Court of Claims Judgment, Apx E1-E4). On October 21, 2002, the Defendants appealed to the Michigan Court of Appeals.[5]

12. On July 26, 2005, the Michigan Court of Appeals issued an Opinion which reversed the Judgment for the Plaintiffs and, without any remand or additional trial, entered full Judgment for the Defendants saying there could be no takings at all as a matter of law. (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v Department of Environmental Quality*, 267 Mich. App. 523, 705 N.W.2d 365 (July 26, 2005), Apx D1-D63).

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[5] The Plaintiffs filed a Cross-Appeal from the Judgment entered on September 30, 2002 with regard to the Trial Court using a low and legislatively controlled statutory interest calculation and not an actual investment loss interest based on uncontroverted proofs at trial offered by the Plaintiffs.

13. On August 15, 2005, the Plaintiffs filed a Motion for Rehearing to the Michigan Court of Appeals. On September 16, 2005, the Michigan Court of Appeals denied the Plaintiffs' Motion for Rehearing. (Court of Appeals Order, Apx C1).

14. On May 17, 2006, the Michigan Supreme Court issued an Order denying the Plaintiffs' Application for Leave to Appeal. (*K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality,* 475 Mich. 856, 713 N.W.2d 268 (May 17, 2006), Apx B1-B2).

15. On June 7, 2006, the Plaintiffs timely filed a Motion for Reconsideration with the Michigan Supreme Court on the basis that Michigan by its published opinion would now require the equivalent of a full physical invasion of property before a regulatory taking is actionable and that there could never exist, in reality, a takings claim in the face of a reciprocity of advantage which the Court of Appeals invoked as a legal basis to eliminate 5th Amendment efficacy all together. On October 31, 2006, the Michigan Supreme Court issued an Order denying the Plaintiffs' Motion for Reconsideration. (*K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality,* 477 Mich. 919, 722 N.W.2d 794 (October 31, 2006), Apx A1-A2)

16. This serves as the Plaintiffs' Petition for Writ of Certiorari to this Court.

ARGUMENTS SUPPORTING ALLOWANCE OF THE WRIT

I. The Michigan Court of Appeals' Opinion Wholly Contradicts this Court's Opinion in *Penn Central* and Its Progeny Including *Lingle v. Chevron*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d. 876 (2005) Thereby Destroying the *Penn Central* Balancing Test In Michigan.

The Michigan Court of Appeals' published Opinion flatly contradicts this Court's Opinion in *Penn Central* and its progeny including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) and *Lingle v. Chevron*,544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). According to this Court, the *Penn Central* Balancing Test is an ad hoc factual "balance" of three factors: 1.) economic impact of the regulation, 2.) investment backed expectations and 3.) character of government action. Under the Michigan Court of Appeals' decision, where there is a "widespread" regulation at issue, a regulatory taking in Michigan is now only possible when the economic impact and the interference with distinct investment-backed expectations are the "functional equivalent" of a "physical invasion". Thus, there is no *Penn Central* Balancing Test in Michigan. This is current precedent in Michigan.

> "Where, as here, the regulation serves an important public interest and is widespread and ubiquitous, we conclude that, to sustain

> a **regulatory takings claim**, a plaintiff must prove that the economic impact and the extent to which the regulation has interfered with distinct investment-backed expectations **are the functional equivalent of a *physical invasion* by the government of the property in question**." (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v. Department of Environmental Quality*, 267 Mich. App. 523, 553; 705 NW2d 365 (July 26, 2005), Apx D17). (Emphasis Added)

This Court has always ruled and consistently confirmed that a regulatory taking can be established by the application of the *Penn Central* Balancing Test. In 2005, this Court ruled that binding precedents first provide two categories of regulatory action that establish a **per se taking**: a **permanent physical invasion** and regulations that **completely deprive an owner of all economically beneficial use of their property**.

> "Our precedents stake out two categories of regulatory action that generally will be deemed ***per se* takings** for **Fifth Amendment** purposes. First, where government requires an owner to suffer a **permanent physical invasion** of her property-however minor-it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in

apartment buildings effected a taking). A second **categorical rule** applies to regulations that completely deprive an owner of "***all* economically beneficial us[e]" of her property**. *Lucas*, 505 U.S., at 1019, 112 S.Ct. 2886 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such **"total regulatory takings,"** except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.*, at 1026-1032, 112 S.Ct. 2886." (**Lingle** *v.* **Chevron USA Inc.**, 544 U.S. 528, 125 S.Ct. 2074, 2081 (2005).) (Emphasis Added)

Next, and outside of these two "narrow" categories, this Court again confirmed that regulatory takings are also viable by application of the *Penn Central* Balancing Test.

"[4] **Outside these two relatively narrow categories** (and the special context of land-use exactions discussed below, see *infra*, at 2085-2087), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)." (**Lingle** *v.* **Chevron USA Inc.**, 544 U.S. 528, 125 S.Ct. 2074, 2081 (2005).) (Emphasis Added)

* * *

"**Today we correct course**. We hold that the "substantially advances" formula is not a

> valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a **"physical" taking**, a *Lucas*-type "total regulatory taking," **a *Penn Central* taking**, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." (**Lingle** *v.* **Chevron USA Inc.**, 544 U.S. 528, 125 S.Ct. 2074, 2087 (2005).)

Here, the case was narrowly and specifically remanded to the Trial Court of Claims by the Michigan Supreme Court to determine the denominator parcel and to then apply this Court's *Penn Central* Balancing Test. The Trial Court of Claims conducted a new trial on the remand, weighed the evidence, factually set the denominator parcel and then found a compensable taking based on the totality of the trial record. On appeal, and subject to a clear error standard of review, the Michigan Court of Appeals wholly rejected the *Penn Central* Balancing Test, the elaborate and largely uncontroverted record adduced, and then substituted its own test and record for a non-categorical regulatory taking.

The Michigan Court of Appeals ruled that where there is a "widespread regulation", a regulatory taking is only possible where the economic impact and interference with investment backed expectations are equivalent to a full

physical invasion. This is disquieting and syllogistically flawed because if there is the equivalent of a full physical invasion or a total deprivation of all economically beneficial use, then there is a per se categorical taking under the precedent of this Court and there is no need to apply the *Penn Central* Balancing Test at all!

In effect, the Michigan Court of Appeals has elevated the character of government action prong to a level where Fifth Amendment remedies cease to exist. Pursuant to the Michigan Court of Appeals ruling, if there isn't a per se categorical taking and the character of government action is the application of a "widespread" regulation, a court is not required to even consider the economic impact of the regulation or the investment backed expectations. These other two prongs of the *Penn Central* Balancing Test: investment backed expectation and the economic impact of the regulation, are effectively destroyed and rendered impotent legal factors. Through its now published ruling, the Michigan Court of Appeals has rendered the *Penn Central* Balancing Test non-existent in Michigan under the guise of this new absolute standard and by invoking the legal fiction of reciprocity of advantage when the character of the government action could not remotely provide any rational of logical legal basis for the same. [6]

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[6] With the Michigan Court of Appeals' current ruling, the possibility of recovering for a temporary regulatory taking

As stated by this Court, the *Penn Central* Balancing Test is an "ad hoc factual inquiry" requiring an analysis of the case facts as a whole with particular significance on the economic impact of the regulation, the impact on investment backed expectations and the character of government action. (See: *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124; 98 S.Ct. 2646; 57 L.Ed.2d 631 (1978).)

However, this Court has made it clear that a landowner does not have to show a complete deprivation to establish a regulatory taking.

> "FN 8 Justice STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." Post, at 2919. **This analysis errs in its assumption that the landowner whose deprivation is *one step short of complete* is not entitled to compensation**. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of **the regulation on the claimant and ... the extent to which the**

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as provided for in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 US 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) is similarly destroyed.

> **regulation has interfered with distinct investment-backed expectations" are *keenly relevant* to takings analysis generally**. Penn Central Transportation Co. *v.* New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). " (**Lucas** *v.* **South Carolina Coastal Council**, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).) (Emphasis Added)

Since this Court's ruling over 80 years ago in *Pennsylvania v. Mahon*, 260 U.S. 393, 43 S.Ct. 159, 67 L.Ed. 322 (1922), not one Justice has ever suggested that the regulatory takings doctrine is limited to physical occupation or a total deprived use. This Court did not rule in *Lingle,* nor has it ever ruled, that a regulatory taking is only possible where a government action is tantamount to a "**physical invasion**". To the contrary, this Court has consistently ruled that when a regulatory taking is not by a physical invasion or a complete deprivation of all economically beneficial use of property, a regulatory taking remains viable after application of the *Penn Central* Balancing Test. Michigan has now rejected this rule of law.

II. This Court Is Asked To Provide a Resolution to the Unsettled Definition of "Character" of Action Within the *Penn Central* Balancing Test.

When properly applied, the "character" of government action factor is a significant factor in the *Penn Central* Balancing Test. The Michigan Court of Appeals

stopped the balance once it ruled the newly enacted specific application of wetland regulation to Plaintiffs' Property alone was somehow "widespread". Aside from violating the *Penn Central* Balancing Test as directed by the remand, the Michigan Court of Appeals did not at all understand this factor.

Since *Penn Central*, courts have struggled to define this factor. This Court has provided numerous potential definitions for "character" of action. One is the concept of average reciprocity of advantage which focuses on whether a regulation applies broadly across a governed community.

Michigan Supreme Court Justice Markman identified the need for resolution as he promoted leave to consider the Michigan Court of Appeals' application of the "average reciprocity of advantage" factor from *Penn Central.*

> "MARKMAN, J., **would grant leave to appeal in order to further consider the Court of Appeals application of the "average reciprocity of advantage"** factor from *Penn Central*" (*K & K Construction, Inc., and J.F.K. Investment Company, L.L.C. v. Department of Environmental Quality*, 475 Mich. 856, 713 N.W.2d 268 (May 17, 2006), Apx B1-B2). (Emphasis Added)

Once Michigan is instructed by this Court on the absolute and binding viability of the *Penn Central* Balancing Test, this Court should also use this case as a vehicle to further resolve the "character" of action factor under *Penn Central.*

The Michigan Court of Appeals ruled, independent on the factual record, that the character of government action at issue provided an "average reciprocity of advantage" calling the regulation "widespread" and "ubiquitous".

> "Wetland regulations are, like **zoning** regulations, all but ubiquitous." (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v. Department of Environmental Quality*, 267 Mich. App. 523, 529; 705 NW2d 365 (July 26, 2005), Apx D6). (Emphasis Added)
>
> * * *
>
> **"Accordingly, we conclude that the character of the government action was a wide-reaching, regulatory action that seeks to protect the rights of the public, and provides an "average reciprocity of advantage," and that this factor weighs heavily against finding that a compensable regulatory taking has occurred here."** (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v. Department of Environmental Quality*, 267 Mich. App. 523, 563, 705 N.W.2d 365 (July 26, 2005), Apx D22). (Emphasis Added)

This analysis and holding is flatly wrong. The regulation of wetlands in Michigan is not remotely akin to general zoning restrictions. Zoning restrictions may, if properly enacted, limit and control the uses of property. By doing so, the zoning restriction potentially diminishes the value of the property by use restriction and control.

However, any such decrease in value is partially offset by an increase in value which flows from similar restrictions as to use on all properties. These zoning restrictions provide a benefit for the municipality and the property pool within its boundaries as a whole and a common benefit for all the property owners in general.

Under Michigan's Wetland Protection Act, there is no such reciprocity. The impacted wetland area restricts the affected landowner from using the property specifically. This loss is borne **solely** by that individual landowner and there is no offset by any increase in value that flows from similar restrictions on surrounding properties. Under zoning, the restrictions are developed by planners and boards of review. Wetlands develop by nature. In fact, there may be no similarly impacted properties for miles. The cost to the impacted property owner is substantial and is borne alone. There are no comparable reciprocal benefits. The loss imposed by the wetland regulation on the individual landowner is not at all similar or "akin" to local zoning and there is no average reciprocity of advantage.

Interestingly, other Federal Courts which have considered regulatory taking claims involving wetlands have found a compensable taking. In *Florida Rock Industries, Inc. v. United States,* 45 Fed. Cl. 21 (1999), the plaintiff purchased a parcel of property in Florida largely composed of wetlands for the purpose of mining limestone. After the *Florida Rock* plaintiff purchased the property, the

amendments to the Clean Water Act, 33 U.S.C.A. Sec. 1251 ("Clean Water Act") were signed into law which required the *Florida Rock* plaintiff to obtain permits to discharge into or dredge wetlands on the *Florida Rock* property. The *Florida Rock* plaintiff was denied its permits and brought suit seeking just compensation for a regulatory taking under the Fifth Amendment.

The Court of Claims in *Florida Rock* applied the *Penn Central* Balancing Test and found a regulatory taking. Specifically, the Court of Claims ruled that the *Florida Rock* plaintiff had been made the "unwilling custodian" of the wetlands on its property for the benefit of the public at large.[7]

> **"Plaintiff has been made the unwilling custodian of the wetlands on its property for the benefit of the public at large, at plaintiff's own risk and expense.** Having analyzed the economic impact of the regulation, plaintiff's reasonable, distinct investment-backed expectations, and the character of the governmental action, the court concludes that the denial of plaintiff's section 404 permit application by the Army

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[7] In looking at whether there is an average reciprocity of advantage, the Court of Claims ruled that a court must assess whether the party has been compensated *directly* through the regulation itself "Accordingly, when the court assesses economic impact, it must determine whether Florida Rock has been compensated through the regulation itself" (**Florida Rock**, 45 Fed. Cl at p. 37.)

> Corps of Engineers effected a compensable partial regulatory taking of plaintiff's 98 acre property." (**Florida Rock**, 45 Fed. Cl at p. 43.)

As this Court knows, the Clean Water Act provides for the protection of wetlands at the federal level just as the Michigan Wetland Protection Act provides for protection of wetlands at the state level. In fact, the Michigan Court of Appeals admitted to this similarity:

> 'Wetland regulations are, like **zoning** regulations, all but ubiquitous. At the federal level, the Clean Water Act (CWA) [FN6] provides for the regulation and protection of wetlands, while Michigan's wetland protection act (WPA) [FN7] serves the same purpose for this state." (*K & K Construction, Inc., and J.F.K. Investment Company, LLC v. Department of Environmental Quality*, 267 Mich. App. 523, 529, 705 N.W.2d 365 (July 26, 2005), Apx D15).

While the Court of Claims in *Florida Rock* found a regulatory taking when permits were denied under the Clean Water Act, the Michigan Court of Appeals did not find a taking where permits are denied under the Wetland Protection Act. The ruling of the Court of Claims in *Florida Rock* is in conflict with the Michigan Court of Appeals ruling illustrating the uncertainty of the definition of "character" of action and the concept of average reciprocity of advantage.

As this Court knows, the Fifth Amendment guarantees that individuals will not suffer public burdens which should be borne by the public as a whole. Wetland protection benefits the public as a whole. (**Armstrong** *v.* **United States**, 364 U.S. 40, 49, 80 S.Ct 1563, 4 L.Ed.2d 1554 (1960).) As Justice Holmes opined in *Pennsylvania v Mahon,* 260 U.S. 393, 416; 43 S.Ct. 158 (1922), a strong public desire to improve the public condition is not enough to warrant not paying for the change sought.

> "**We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change**." (*Pennsylvania v Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158 (1922).) (Emphasis Added)

Here, the Plaintiffs have suffered a uniquely felt multi-million dollar loss which is not offset by benefits flowing from the preservation of other wetlands. The benefits that flow from the Wetland Protection Act benefit the State of Michigan as a whole. The Plaintiffs here will not garner a larger share of these benefits. There is no average reciprocity of advantage demonstrating that the Plaintiffs receive benefits in proportion to their losses. Despite this, the Plaintiffs here are now asked to individually bear a multi-million dollar public burden because Michigan now views wetland regulations as general zoning ordinances. The alleged vision of good

garnered from the Wetland Protection Act ignores the good of the oppressed, the Plaintiffs. As Charles Fried wrote in his recent work "Modern Liberty":

> "Those who impose on others are often convinced that the good they are after is a good as much for their victims as for themselves, and so they claim that there are no victims at all. . . But running through this history of subjection and enslavement is the claim of some to coerce the service of others, whether for a common good, the good of the oppressor, or some good that is an abstract from both and applicable to all." ("Fried, *Modern Liberty And The Limits of Government* (New York: W.W. Norton & Company, 2007), p 18.

Regardless of the benefit sought by the regulatory scheme, this violates the foundation of the Fifth Amendment. If a regulation is imposed on a discrete class of owners solely for the benefit of a larger class, there is a potential taking. This should hold true in Michigan and the *Penn Central* Balancing Test should serve to establish such takings. The Michigan Court of Appeals' current application of the Michigan Wetland Protection Act is at odds with the Fifth Amendment as well as its own State's legislative scheme providing for just compensation in the Wetland Protection Act.

The drafters of the Michigan Wetland Protection Act expressly contemplated a taking. The Wetland Protection Act states that where a taking is caused by the

Act, the individual will be compensated for "lost value" -- MCL 281.721. The Wetland Protection Act was the precursor to the Natural Resources and Environmental Protection Act which provides, at MCL 324.30323, that if a person suffers a taking by way of the wetland regulation scheme in Michigan, then the Court can order that the department or the local unit of government to compensate the property owner for the full amount of the ***lost value***. Now, this statute is abolished by the Michigan Courts.

> "(3) **If the court determines that an action of the department or a local unit of government pursuant to this part or an ordinance authorized pursuant to section 30307(4) constitutes a taking of the property of a person, then the court shall order the department or the local unit of government, at the department's or the local unit of government's option, as applicable, to do 1 or more of the following:**
>
> **(a) Compensate the property owner for the full amount of the lost value. . . .**" (MCLA 324.30323) (Emphasis Added)

The Wetland Protection Act and NREPA both envision compensation for "lost value" under the wetland protection scheme. To say that the Wetland Protection Act itself weighs against the finding of a taking contradicts its controlling language.

The application of the Wetland Protection Act offers a possible resolution to the unsettled definition of

"character" of action. The application of the Wetland Protection Act shows that the burdens imposed by the Wetland Protection Act are particular in their affect and, by statutory design, potentially violate the Fifth Amendment. This concept of "generality v. particularity" of regulation is critical to any proper takings analysis. The Plaintiffs suggest to this Court that the "character" of action element of the *Penn Central* Balancing Test should focus on the generality versus particularity of regulation.

As this Court said in *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d. 798 (2001), it has given some, "but not too specific", guidance to Courts for analyzing regulatory takings.

> "Since ***Mahon,*** we have **given some, but not too specific**, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." (**Palazzolo** *v.* **Rhode Island**, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 798 (2001).)

Given the Michigan Court of Appeals' recent published Opinion at issue here, it is clear that more "guidance" is required and this case offers an opportunity to do so.

It would make little sense in a condemnation case to suggest that the government is excused from its obligation to pay for a right of way for a road on the grounds that the road serves an important or "widespread" public need. While the Wetland Protection Act provides a potential benefit to the public as a whole, the Plaintiffs cannot be

asked to bear this burden by being the honorary custodians of the State's wetlands while the Property remains idle and the Plaintiffs continue to pay the taxes.[8]

III. The Question Presented Is Important.

The Michigan Court of Appeals' **published** Opinion now allows the State of Michigan and its agencies to tread fully and cavalierly on the rights of its citizens by taking their private property without any chance at all for relief by applying the *Penn Central* Balancing Test. This directly conflicts with this Court's rulings including the recent Opinion in *Lingle*.

IV. The Decision Of The Michigan Court Of Appeals Is Erroneous.

The Michigan Court of Appeals' ruling that a takings analysis is now sharpened to a question of whether there has been a taking tantamount to a physical invasion is clearly erroneous.

This Court long ago ruled, and has consistently confirmed, that a physical invasion is **not** the test for a regulatory taking. If not a taking per se, regulatory takings are assessed through the *Penn Central* Balancing Test.

---

[8] Plaintiffs to this day faithfully pay annual heavy State property taxes while the development of the Property remains idle by virtue of the Court of Appeals' Opinion.

This is the law in the United States and it should be made to apply in Michigan.

The Michigan Court of Appeals' ruling demanding evidence of a per se categorical taking tantamount to a "**physical invasion**" utterly destroys the balancing test.

The Michigan Court of Appeals has no power to rewrite the State's statutes. When enacting these regulatory schemes to address wetland protection, the Michigan legislature contemplated the regulatory scheme could cause a taking. The Michigan Court of Appeals has no business deleting this portion of the statute and ignoring *Penn Central* in the process.

The Michigan Court of Appeals' **published** Opinion affects every potential property developer in Michigan. The Michigan Court of Appeals' Opinion allows the State and its agencies to take private property without the *Penn Central* Balancing Test. Michigan is now left without a regulatory taking remedy.

Certiorari jurisdiction is warranted to correct this error and clarify the law at issue.

CONCLUSION

For the reasons stated above, the Petitioners respectfully request that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

MICHIGAN SUPREME COURT:

Order Denying Motion for Rehearing,
filed 10/31/06 ..... A1 - A2

Order Denying Discretionary Review,
filed 05/17/06 ..... B1- B2

MICHIGAN COURT OF APPEALS:

Order Denying Motion for Rehearing,
filed 09/16/05 ..... C1 - C1

Opinion,
filed 07/26/05 ..... D1 - D63

COURT OF CLAIMS:

Judgment,
filed 09/30/02 ..... E1 - E4

Opinion and Order,
filed 05/24/02 ..... F1 - F9

UNITED STATES SUPREME COURT:

Order Denying Plaintiffs' Motion for Rehearing.
filed 11/30/98 ..... G1 - G1

Order Denying Plaintiffs' Petition for
Writ of Certiorari.
filed 10/05/98 ..... H1 - H2

MICHIGAN SUPREME COURT:

Opinion,
filed 03/24/98 ..... I1 - I36

Order Granting Discretionary Review,
filed 04/29/97 ..... J1 - J3

MICHIGAN COURT OF APPEALS:

Opinion,
filed 06/04/96 ..... K1 - K33

COURT OF CLAIMS:

Judgment,
filed 09/08/93 ..... L1 - L7

Second Opinion and Order,
filed 05/04/93 ..... M1 - M11

Opinion and Order,
filed 11/02/92 ..... N1 - N16

CEASE AND DESIST ORDER:

Cease and Desist Order dated 05/09/88 ..... O1 - O1

LETTERS:

DNR Letter
Dated 01/11/88 ..... P1 - P2

STATUTES:

MCL 281.701 et. seq. ..... Q1 - Q56

MCL 324.30301 et. seq. ..... R1 - R46

477, Mich. 919, 722 N.W.2d 794

Briefs and Other Related Documents

Supreme Court of Michigan.
K & K CONSTRUCTION, INC., and
J.F.K. Investment Company, L.L.C.,
Plaintiffs-Appellants,
v.
DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellee.
Docket No. 129761.
COA No. 244455
Oct. 31, 2006.

On order of the Court, the motion for reconsideration of this Court's May 17, 2006 order is considered, and it is **DENIED**, because id does not appear that the order was entered erroneously.

TAYLOR, C.J., not participating.

MARKMAN, J., would grant reconsideration and, on reconsideration, would grant leave to appeal for the reason set forth in *K & K Construction, Inc. v. Dep't of Environmental Quality*, 475 Mich. 856, 713 N.W. 2d 268 (2006).

Mich., 2006
K & K Const., Inc. v.
Department of Environmental Quality
477 Mich. 919, 722 N.W.2d 794

Briefs and Other Related Documents (Back to top)

• 129761 (Docket) (Oct. 21, 2002)
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(C) 2006 Thompson/West. No. Claim
to Orig. U.S. Govt. Works.

475 Mich. 856, 713 N.W.2d 268

Briefs and Other Related Documents

Supreme Court of Michigan.
K & K CONSTRUCTION, INC., and J.F.K. Investment Company, L.L.C.,
Plaintiffs-Appellants,
v.
DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellee.
Docket No. 129761.
COA No. 244455.
May 17, 2006.

Prior report: 267 Mich.App. 523.705 N.W.2d 365.

****269*** Order

On order of the Court, the application for leave to appeal the July 26, 2005 judgment of the Court of Appeals is considered, and it is **DENIED**, because we are not persuaded that the questions presented should be reviewed by this Court.

TAYLOR, C.J., not participating.

MARILYN J. KELLY, J., would grant leave to appeal.

MARKMAN, J., would grant leave to appeal in order to further consider the Court of Appeals application of the "average reciprocity of advantage" factor from *Penn*

Central Transportation Co. v. City of *New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Mich., 2006.
K & K Const., Inc. v.
Department of Environmental Quality
475 Mich. 856, 713 N.W.2d 268

Briefs and Other Related Documents (Back to top)

129761 (Docket) (Oct. 21, 2002)

COURT OF APPEALS, STATE OF MICHIGAN
ORDER

Brian K. Zahra
Presiding Judge

Henry William Saad
Bill Schuette
Judges

K&K Construction Inc v Dept of Environmental Quality

Docket No. 244455

LC No. 88-012120 CM

The Court orders that the motion for reconsideration is **DENIED**.

/s/ Brian K. Zahra
Presiding Judge

A true copy entered and certified by
Sandra Schultz Mengel, Chief Clerk, on

Sep. 16, 2005 /s/ Sandra Shultz Mengel
Chief Clerk

267 Mich.App. 523, 705 N.W.2d 365

Court of Appeals of Michigan.
K & K CONSTRUCTION, INC.,
and J.F.K. Investment Company, LLC,
Plaintiffs-Appellees,
v.
DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellant.

Docket No. 244455.
Submitted April 20, 2005, at Lansing.
Decided July 26, 2005, at 9:25 a.m.
Released for Publication Oct. 26, 2005.

Background: Land developers whose application for permit to fill wetlands was denied sought compensation for regulatory taking. The Court of Claims judgment finding a compensable taking was affirmed by the Court of Appeals, 217 Mich.App. 56, 551 N.W.2d 413. The Supreme Court, 456 Mich. 570, 575 N.W.2d 531, reversed and remanded. On remand, the Court of Claims, William E. Collette, J., again found that a taking had occurred. Department of Environmental Quality (DEQ) appealed.

Holding: The Court of Appeals, Saad, J., held that wetland regulations which led to denial by the DEQ of developers' application for permit to fill wetlands did not effect a compensable regulatory taking of developers' property.
Reversed.

West Headnotes

[1] Eminent Domain 148 2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases

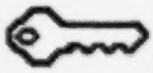
No compensable regulatory taking occurs where (1) a land use regulation is comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, (2) the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment, and (3) despite the regulation, the owner can make valuable use of his or her land. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain 148 262(1)

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k250 Appeal
148k262 Review

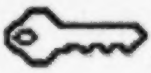
148k262(1) k. In General. Most Cited Cases

Whether the government has effected a taking of one's property is a constitutional issue which the Court of Appeals reviews de novo.

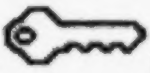
[3] Appeal and Error 30  **1197**

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1196 Powers and Duties of Lower Court
30k1197 k. Jurisdiction of Lower Court After Remand. Most Cited Cases

Power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court.

[4] Appeal and Error 30  **1196.1**

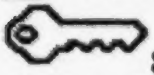
30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1196 Powers and Duties of Lower Court
30k1196.1 k. In General. Most Cited Cases

Appeal and Error 30  **1198**

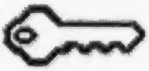
30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court

30k1196 Powers and Duties of Lower Court
30k1198 k. Compliance with Mandate or Directions. Most Cited Cases

When an appellate court remands a case without instructions, lower court has the same power as if it made the ruling itself; however, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order.

[5] Administrative Law and Procedure 15A  **820**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(F) Determination
15Ak820 k. Further Administrative Proceedings. Most Cited Cases

Appeal and Error 30  **1198**

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1196 Powers and Duties of Lower Court
30k1198 k. Compliance with Mandate or Directions. Most Cited Cases

It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court.

[6] Eminent Domain 148 2.27(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases

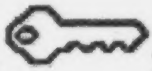
Wetland regulations which led to denial by the Department of Environmental Quality (DEQ) of developers' application for permit to fill wetlands did not effect a compensable regulatory taking of developers' property; though diminution of value was significant, the relevant tract retained substantial value and usefulness, the investment-backed expectations of the applicants, both experienced commercial land developers, had to take into account the extant regulations at time property was acquired, and the wetland regulations were comprehensive and universal throughout the state and did not single out the subject property to bear the burden of a public benefit. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2; M.C.L.A. § 324.30301 et seq.

[7] Eminent Domain 148 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power

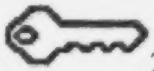
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

Governmental regulation that deprives a landowner of all economically beneficial use of his or her property is a categorical taking that requires compensation. U.S.C.A. Const.Amend. 5.

[8] Eminent Domain 148  **2.1**

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

Reduction in the value of the regulated property is insufficient, standing alone, to establish a compensable regulatory taking. U.S.C.A. Const.Amend. 5.

[9] Eminent Domain 148  **2.1**

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

In determining whether compensable regulatory taking has occurred, court must examine the extent to which the

regulation has interfered with the property owner's reasonable investment-backed expectations, with respect to which owner's notice of the applicable regulatory regime is a key factor. U.S.C.A. Const.Amend. 5.

[10] Eminent Domain 148 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. U.S.C.A. Const.Amend. 5.

[11] Eminent Domain 148 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

In looking at character of government action to determine whether compensable regulatory taking has occurred, relevant inquiries are whether the governmental regulation

singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged here is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally. U.S.C.A. Const.Amend. 5.

[12] Courts 106 95(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k95 Decisions of Courts of Other State
106k95(1) k. In General. Most Cited Cases

In assessing whether compensable regulatory taking has occurred, Court of Appeals is not bound by the decisions of the courts of other states, though it may look to those regulatory taking decisions as persuasive authority.

**366 Robert L. Bunting, Oxford, Robert Charles Davis, Sterling Heights, and Richard L. Hoffman, Lake Orion, for the plaintiffs.

Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, and S. Peter Manning, Assistant Attorney General, for the defendant.

Before: ZAHRA, P.J., and SAAD and SCHUETTE, JJ.

SAAD, J.

*526 The trial court entered judgment in favor of plaintiffs against defendant. Defendant appeals the judgment, and we reverse and enter judgment in favor of defendant.

**367 I. NATURE OF THE CASE

When a citizen claims that a governmental land-use regulation, or its regulatory implementation, adversely affects the value of his or her property, and seeks just compensation under the Taking Clause of the Fifth Amendment, [FN1] our courts must decide whether the challenged governmental action, and its consequent effect on private property, constitutes a "regulatory taking" under federal and state taking jurisprudence.

FN1. U.S. Const., Am. V; see also Const. 1963, art. 10, § 2.

More specifically, when, as here, the government regulates land use-as opposed to taking physical possession of land [FN2]-and where, as here, the challenged *527 regulation is stipulated to be for the public good, our limited role is to answer the specific constitutional question: where implementation of a valid land use regulation [FN3] negatively impacts a private citizen's valuable property rights, does the Taking Clause require *528 compensation? To answer this question, our Supreme Court has instructed

us to examine the United States Supreme Court's seminal decision in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).[FN4]

> FN2. As the United States Supreme Court explained:
>
> The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.* at 415, 43 S.Ct. 158. [*Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).]
>
> FN3. Land-use regulations, such as zoning, are necessary to protect private property

rights and values. Zoning regulations can be used to prevent, for example, a mining operation or a factory from being built within a residential neighborhood. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 385-389, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Such a zoning regulation creates what Justice Holmes termed "an average reciprocity of advantage," *Mahon, supra* at 415, 43 S.Ct. 158, which both burdens and benefits landowners relatively equally. Such regulations are not considered takings, and thus do not require compensation, in part because, as Justice Holmes stated, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413, 43 S.Ct. 158. On the other hand, "if regulation goes too far it will be recognized as a taking." *Id.* at 415, 43 S.Ct. 158. When the effect of a regulation goes as far as to deprive a property owner of *all* economically beneficial value of his or her land, it results in a "categorical taking." See, e.g., *Palazzolo, supra* at 615-616, 121 S.Ct. 2448, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); see also *Mahon, supra* at 413-416, 43 S.Ct. 158 (regulation forbade coal mining on land for which the plaintiff was the holder of mineral rights, thus destroying the plaintiff's entire interest in the land); see also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*

Regional Planning Agency, 535 U.S. 302, 324, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way-often in completely unanticipated ways. Treating them all as *per se* takings could transform government regulation into a luxury few governments could afford.").

FN4. See *K & K Constr., Inc. v. Dep't of Natural Resources*, 456 Mich. 570, 587-588, 575 N.W.2d 531 (1998). Indeed, as we will discuss further below, our Supreme Court so instructed the trial court. However, the trial court, while acknowledging the *Penn Central* test and our Supreme Court's mandate, failed to actually apply the *Penn Central* factors during the trial after remand.

**368 The United States Supreme Court in *Penn Central* laid out a three-factor test for courts to apply to answer this important constitutional question:

[1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to

promote the common good. [*Id.* at 124, 98 S.Ct. 2646 (citations omitted).]

The taking jurisprudence articulated by the United States Supreme Court in *Penn Central* and its progeny [FN5] requires that our courts consider the following factors in deciding whether a "regulatory taking" claim is compensable: (1) what is the average reciprocity of advantage, in other words, is the aggrieved property owner singled out to pay for the public good, or is the land-use regulation so universal and ubiquitous that the benefits and burdens of the land-use regulation fall relatively equally among all, including the complaining ***529** party; (2) what use could the landowner reasonably expect to make of the land given the state of the land-use regulations at the time of acquisition (as part of this inquiry, it is necessary to take into account whether the landowner knew, or should have known, of the land-use regulation at the time of purchase); and (3) did the specific, challenged application of the land-use regulation leave the property owner valuable land use rights or did it instead render the land virtually worthless?

> FN5. See, e.g., *Tahoe-Sierra, supra; Palazzolo, supra; Lucas, supra.*

[1] Stated another way, if the land-use regulation, like traditional zoning and wetland regulations: (1) is comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the

challenged regulation as other similarly situated property owners, and (2) if the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment, and (3) if, despite the regulation, the owner can make valuable use of his or her land, then compensation is not required under *Penn Central.*

Here, plaintiffs claim that the denial by the Department of Environmental Quality (DEQ) of a permit to fill in the wetland on their property constitutes a regulatory taking. Wetland regulations are, like zoning regulations, all but ubiquitous. At the federal level, the Clean Water Act (CWA) [FN6] provides for the regulation and protection of wetlands, while Michigan's wetland protection act (WPA) [FN7] serves the same purpose for this state. Our Legislature made clear that it enacted the WPA to benefit all the people of this state. The act provides that "[t]he legislature finds that ... [w]etland ***530** conservation is a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or ****369** wetland of other counties." M.C.L. § 324.30302(1)(a).[FN8]

FN6. 33 U.S.C. § 1251, *et seq.*

FN7. M.C.L. § 324.30301 *et seq.*

FN8. The statute provides that the Legislature further found that:

(b) A loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland:

(i) Flood and storm control by the hydrologic absorption and storage capacity of the wetland.

(ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.

(iii) Protection of subsurface water resources and provision of valuable watersheds and recharging ground water supplies.

(iv) Pollution treatment by serving as a biological and chemical oxidation basin.

(v) Erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(vi) Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.

(c) Wetlands are valuable as an agricultural resource for the production of food and

> fiber, including certain crops which may only be grown on sites developed from wetland. [M.C.L. § 324.30302(1)(b)-(1)(c).]

Clearly, all people, including property owners, are the intended beneficiaries of the regulation of wetlands. Like zoning regulations, wetland regulations place a burden on some property owners, but this burden ultimately benefits all property owners, including those who claim they are unfairly burdened.

As we will discuss in detail later, we reject plaintiff's claim because (1) wetland regulations are, much like ***531** zoning regulations, comprehensive, universal, and ubiquitous, and provide an "average reciprocity of advantage" for all property owners, including plaintiffs; (2) plaintiffs have developed and retain the ability to develop a significant amount of their property, and thus plaintiffs' property retains a significant value even after the permit denial; and (3) plaintiffs are experienced commercial land developers who clearly had or were on notice of the wetland regulations promulgated under the WPA, and, therefore, plaintiffs' distinct, investment-backed expectations would reasonably have been tempered with the knowledge that their development of the property would be restricted because of the presence of wetlands.

II. FACTS AND PROCEDURAL HISTORY

A. Procedural History

This case was originally filed in the Court of Claims on December 29, 1988. Plaintiffs, K & K Construction, Inc., the J.F.K. Company, and Resorts and Company, alleged that defendant, then the Michigan Department of Natural Resources (DNR) (currently the Department of Environmental Quality),[FN9] had effected a regulatory taking of plaintiffs' property when it designated part of that property as wetland and denied a permit to fill in the wetland and build on the property. Following a nonjury trial, the trial court entered judgment in favor of plaintiffs. The trial court found that the DEQ's failure to issue the requested permit constituted a categorical taking of plaintiffs' property.

> FN9. For the sake of consistency, though the Department of Environmental Quality was known as the Department of Natural Resources at the outset of this case, we will refer to defendant as "DEQ" throughout our opinion.

***532** The DEQ appealed to this Court, which, as it turns out, erroneously affirmed the trial court's judgment. *K & K Constr., Inc. v. Dep't of Natural Resources*, 217 Mich.App. 56, 551 N.W.2d 413 (1996) (*K & **370 K*), rev'd 456 Mich. 570, 575 N.W.2d 531 (1998). The DEQ then

appealed to our Supreme Court, which reversed this Court's decision and the trial court's judgment. *K & K Constr., Inc. v. Dep't of Natural Resources*, 456 Mich. 570, 575 N.W.2d 531 (1998) (*K & K II*). Our Supreme Court held that (1) the trial court erred when it considered only the parcel of land that contained wetland (parcel one) and did not include two other contiguous parcels of land owned by plaintiffs (parcels two and four) and (2) plaintiffs were not deprived of all economic use of the land and thus there was no "categorical taking." *Id.* at 586, 575 N.W.2d 531. Further, our Supreme Court remanded to the trial court with instructions (1) to include the value of the two other parcels, (2) to make a finding of fact regarding whether a third parcel (parcel three) should be included in the value, and (3) to apply the balancing test articulated by the United States Supreme Court in *Penn Central* to determine whether plaintiffs proved their regulatory taking claim. *K & K II* at 588, 575 N.W.2d 531.

On remand, plaintiffs J.F.K. Company and Resorts and Company were succeeded by J.F.K. Investment Co., LLC (JFK). The parties stipulated that parcel four was not to be included in the trial court's determination, and the trial court held that parcel three would be included with parcels one and two when it determined whether a taking had occurred because of the wetland regulation. The trial court then held that under *Penn Central*, a taking had occurred and entered judgment in favor of plaintiffs.

The DEQ once again has appealed to this Court, and plaintiffs have cross-appealed.

*533 B. Factual History

1. Overview

This case involves four contiguous parcels of land with a total area of approximately eighty-two acres in Waterford Township in Oakland County (parcels one through four). In 1988, a partnership was formed between J.F.K. Company and Resorts and Company, with each holding a fifty percent interest, for the purpose of developing the land in issue.[FN10] At some point, plaintiff J.F.K. Investment Company, LLC, replaced J.F.K. Company and Resorts and Company as a successor in interest. Plaintiff K & K Construction is a Michigan corporation in which Kosik owns fifty percent of the shares of stock.[FN11]

FN10. Joseph Kosik, Sr. (Kosik), and his wife Elaine acquired the land, which was originally farmland, in 1976. A series of often confusing real estate transactions ensued, as well as reorganizations of various business entities. The Kosiks quitclaimed the land in 1977 to Kosik and Leon Blachura as individual guarantors, and to Waterford Mall, a partnership consisting of the J.F.K. Company, a Michigan limited partnership consisting of their five sons; Alpine Valley

Ski Area, Inc., a Michigan corporation; Alpine Valley Resort, Inc., a Wisconsin corporation; and the North Oakland Development Corporation. In 1983, Kosik; Alpine Valley Ski Area, Inc.; and Alpine Valley Resorts, Inc., conveyed their interests in the land to J.F.K. Company. In the meantime, litigation, through which the Kosiks and J.F.K. Company sought to quiet title to the land in their favor because of the North Oakland Development Corporation's default on its obligations, was resolved in 1986 with a circuit court warranty deed conveying the entire interest in the land to the Kosiks and J.F.K. Company. Because of the Kosiks' and Alpine Valley's conveyances, J.F.K. Investment Company ultimately held title to the land.

FN11. While K & K Construction, Inc., does not own any interest in the land, it was under contract to develop a part of it. It appears that to date there is no dispute with respect to whether K & K is a proper party to this case. Yet, both *K & K I*, and *K & K II*, acknowledge that K & K Construction has no ownership interest in the land, and for reasons that remain unclear, K & K was permitted to continue as a party to this suit.

****371 *534** Parcel one is zoned for commercial use, consists of approximately fifty-five acres, and approximately twenty-seven of those acres are wetland. Parcel two consists of sixteen acres directly south of parcel

one and has a small area of wetland. Parcel three is 9.34 acres of land directly south of parcel two, with no wetland. Parcel four is 3.4 acres of land bordering the south side of parcel one and the east side of parcel two, and it has no wetland. Parcels two, three, and four are zoned for multiple-family housing. The parcels are bounded by Highland Road (M-59) on the north, North Oakland Drive on the east, Hospital Road on the west, and Pontiac Lake Road on the south.

Plaintiffs began work on a "C.J. Barrymore's Restaurant" in 1988, which was to occupy forty-two acres on parcel one and to consist of a restaurant and a sports complex, including a baseball diamond. Waterford Township issued plaintiffs a cease-and-desist letter that stated that part of parcel one contained wetland and that plaintiffs would need to get a permit from the DEQ. Plaintiffs then filed a permit application with the DEQ dated May 28, 1988, which was received by the DEQ on June 21, 1988. On June 7, 1988, plaintiffs filed an "administrative complaint" with the DEQ and sought a ruling from the department that would remove a "designation of wetland" from plaintiffs' property. Waterford Township sent a letter to plaintiffs informing them that their permit for lowland filling would be denied pending the outcome of the DEQ permit process. In November 1988, the DEQ issued a letter that denied plaintiffs' permit application.[FN12] Plaintiffs filed this action*535 in December 1988.[FN13]

FN12. The letter stated, among other things, that the proposed development was "not wetland dependent," that plaintiffs had "alternatives available in the avoidance of the wetland," and that there had been no public need for the development demonstrated. The letter went on to note that DEQ representatives saw "drainage ditches present[,] which cut through the wetland area, as well as large amounts of sand fill deposited over much of the site," and ordered plaintiffs to cease and desist from any further excavation of ditches and placement of sand fill in the wetland area.

FN13. Though we need not comment on plaintiffs' failure to seek administrative relief, we note that the Legislature provided for an extensive administrative appeal process and for judicial review of the administrative appeal. See M.C.L. § 324.30307.

In May 1990, plaintiffs filed another application for a permit, under what is called the "Goga Plan." FN14 The Goga Plan would have allowed plaintiffs to fill three acres of wetland, convert five acres of "upland" property to wetland, and develop the upland ring around the wetland. This permit application was also denied. At some point, both an office building for J.F.K. Investment Company and

a Ram's Horn Restaurant were built on upland portions of parcel one.[FN15]

> FN14. This alternative plan for development was apparently named for an engineer who devised the plan for plaintiffs. We will hereafter refer to this permit as the "Goga permit."

> FN15. Though pursuant to our Supreme Court's holding in *K & K II*, we are to consider the entire denominator parcel, which consists of parcels one, two, and three, we find it necessary at times to refer to the constituent parcels individually. Nevertheless, our ultimate analysis under *Penn Central* is applied, as our Supreme Court has mandated, to the denominator parcel as a whole.

This matter was originally tried in December 1991, and the only issue before the trial court was whether the permit denials constituted a taking of plaintiffs' property. The trial court held that *only* parcel one **372 was relevant to its analysis of whether a taking had occurred and concluded that the permit denials had rendered the parcel, which was worth approximately $6 million before the permit denial, completely worthless after the denial. Having found a categorical taking, the trial court ordered the DEQ to compensate plaintiffs for this $6 million loss in value.

***536** After the trial court's ruling, the DEQ opted to mitigate the loss under M.C.L. § 324.30323, which requires a trial court to give the DEQ the option, once a taking has been found, to mitigate its damages by doing one of the following: compensate the property owner for the lost value, purchase the property, or "*[m]odify its action or inaction with respect to the property so as to minimize the detrimental affect [sic] to the property's value*" (emphasis added).[FN16] The DEQ chose to reverse its previous decision and issue the Goga permit. The trial court entered judgment in favor of plaintiffs against the DEQ for a "temporary taking" [FN17] of the land that was ***537** subsequently allowed to be developed under the Goga Plan for the full value of the wetland on parcel one. The judgment was for approximately $450,000 plus interest for the alleged temporary taking, and approximately $3.25 million plus interest for the alleged wetland taking. At the original trial, the trial court took into account the mitigating effect of the DEQ's issuance of the Goga permit when it calculated the amount of the judgment.

> FN16. M.C.L. § 324.30323(3) provides:
> If the court determines that an action of the department or a local unit of government pursuant to this part or an ordinance authorized pursuant to section 30307(4) constitutes a taking of the property of a person, then the court shall order the department or the local unit of government, at the department's or the local unit of

government's option, as applicable, to do 1 or more of the following:

(a) Compensate the property owner for the full amount of the lost value.

(b) Purchase the property in the public interest as determined before its value was affected by this part or the local ordinance authorized under section 30307(4) or the action or inaction of the department pursuant to this part or the local unit of government pursuant to its ordinance.

(c) Modify its action or inaction with respect to the property so as to minimize the detrimental affect [sic] to the property's value.

FN17. We note that the United States Supreme Court rejected a "temporary taking" claim in *Tahoe-Sierra, supra* at 330-335, 122 S.Ct. 1465. The Court reasoned that requiring a governmental agency to compensate a property owner for the loss of value while considering applications for permits and variances under a land-use regulatory scheme would either become cost-prohibitive or lead to governmental agencies making hasty, presumably haphazard, decisions. *Id.* at 334-335, 122 S.Ct. 1465.

The DEQ appealed the trial court's ruling to this Court. Another panel of this Court affirmed the trial court's judgment and agreed with the trial court that plaintiffs had been denied all economically beneficial use of their land, which resulted in a categorical taking. Our Supreme Court reversed, and reasoned (1) that the trial court erred in only considering parcel one and in not including parcels two and four in its valuation of plaintiffs' property, [FN18] and (2) in considering parcels one, two, and four, "it is clear that there was not a categorical taking...." [FN19] The Court then remanded to the trial court, and instructed it to calculate the total value of the property using parcels one, two, and four, and to make a finding regarding whether parcel three should be considered part of the "denominator parcel." Additionally, the **373 Court held that, while the record was not clear regarding whether the trial court had failed to include the value of the two developed portions of parcel one in its valuation, there was no reason for the trial court not to do so. The Court then held that, once the trial court determined whether parcel three should also be included, and the total value including all relevant parcels (either parcels one, two, and four, or all four parcels) was calculated, the trial court was to apply the *538 three-part balancing test from *Penn Central* to determine whether the DEQ's administrative decision had constituted a regulatory taking.[FN20] After plaintiffs' unsuccessful petition for certiorari in the United States Supreme Court, the case returned to the trial court.[FN21]

FN18. *K & K II, supra* at 578-582, 575 N.W.2d 531.

FN19. *Id.* at 586, 575 N.W.2d 531.

FN20. After remand, at the second trial, the parties stipulated that parcel four would not be considered in the trial court's determination of the value of plaintiffs' property, because that parcel was purchased after the denial of the permits.

FN21. Plaintiffs assert that throughout the pendency of this litigation, their attempts to develop or sell parcel one have been thwarted by the DEQ's appeal of this case. Of course the DEQ has the absolute right to appeal and, indeed, the duty to appeal an erroneous damage award because the DEQ is the appropriate state agency to protect both public funds and wetlands. Plaintiffs had the right to pursue development under the Goga permit that plaintiffs themselves proposed.

Unsurprisingly, during trial, plaintiffs and the DEQ offered conflicting deposition testimony relating to the value of the property. At the first trial, plaintiffs presented the testimony of Edward Cheyz, who is not a licensed real estate appraiser. He testified that parcel one was valued at approximately $5.94 million before the denial of the permit. The trial court accepted this figure while rejecting

the testimony of the DEQ's appraiser. As discussed previously, the trial court found the value of these parcels to be zero after the first trial. On remand, plaintiffs offered the deposition testimony of James Mawson, a licensed appraiser, who initially testified that the pre-denial value of $5.94 million calculated by Cheyz was correct. This figure apparently represented a figure of $1.50 per square foot used by Cheyz in calculating the total value. However, on cross-examination, Mawson testified that he did not believe that Cheyz would be correct in valuing wetland at $1.50 per square foot and that a more appropriate figure might be $0.05 per square foot of wetland.

*539 On the other hand, the DEQ offered its own expert testimony and evidence in an attempt to show that the property's "before" value had been overestimated and that its "after" value had been grossly underestimated. The DEQ also submitted evidence that, contrary to plaintiffs' arguments that the non-wetland (upland) portion of parcel one was too shallow for development, other similar "shallow" lots had been developed in the area.

Regardless, the trial court, in its opinion and order issued after the second trial, stated incorrectly that, because our Supreme Court "did not disturb" its initial valuation of parcel one, it would reaffirm that value, and the trial court again concluded that parcel one had no value after the denial of the permit. The trial court did so despite the fact

that our Supreme Court held that a categorical taking [FN22] had not occurred. *K & K II, supra* at 585-587, 575 N.W.2d 531. Furthermore, the trial court reaffirmed its finding that parcel one had zero value despite the existence of the **374 Ram's Horn and the JFK office building, and despite the fact that our Supreme Court stated that it saw "no reason for [the office building and the Ram's Horn] to be excluded from the taking analysis. They were both part of parcel one ... and neither was sold or developed before the enactment of the regulations in question." *K & K II, supra* at 584 n. 9, 575 N.W.2d 531. It further concluded that the value of parcels two and three, which totaled over $3 million, was not enough to offset this loss, and that the total value before the denial was just over $9 million, while the value after the denial was just over $3 million, representing a sixty-seven percent *540 loss. The trial court then briefly addressed each of the three *Penn Central* factors before concluding again that the DEQ's permit denial constituted a taking. The trial court's opinion stated that it would reaffirm its previous award.

> FN22. As we will discuss in greater detail later, when a governmental regulation deprives a landowner of " 'all economically beneficial use' " of his or her property, a categorical taking occurs, which requires compensation. *Palazzolo, supra* at 615-616, 121 S.Ct. 2448, quoting *Lucas, supra.*

At a hearing on plaintiffs' posttrial motion for entry of judgment, the trial court found that the DEQ's issuance of the Goga permit had not been a valid or effective way of mitigating its damages as required by M.C.L. § 324.30323 and entered judgment in September 2002 against the DEQ in the amount of $16,486,228, which included compensation for a taking of plaintiffs' property in the amount of $5.9 million, the value the trial court allocated to parcel one, together with interest, costs, and attorney fees. The judgment further imposed interest on the entire judgment, including fees and costs.

Plaintiffs moved the trial court to reconsider the judgment rate of interest. They argued [FN23] that the statutory rate of interest was insufficient, because plaintiffs were experienced real estate developers who could easily earn several times greater returns on their investment. The trial court rejected this argument and denied plaintiffs' motion for a greater rate of interest. Plaintiffs have filed a cross-appeal to challenge the denial of this motion.

FN23. Interestingly, plaintiffs raised this argument for the first time on remand.

2. Damages and the Goga Permit [FN24]

FN24. The appendix to our opinion is a chart that summarizes the trial court's award of damages after both trials.

After the first trial, the DEQ faced a judgment in excess of $6 million for what the trial court wrongly *541 held to be a categorical taking of plaintiffs' property. As permitted by statute, M.C.L. § 324.30323, the DEQ decided to mitigate these damages and opted to issue the Goga permit pursuant to the permit application submitted by plaintiffs. The trial court then issued a written opinion that acknowledged that the DEQ's election of this option had reduced the amount of the taking award to approximately $3.25 million. [FN25] The trial court additionally awarded approximately $450,000 for the temporary taking of plaintiffs' property up to the issuance of the Goga permit.

FN25. This amount reflects the trial court's calculation of the value of the percentage of parcel one that constituted wetland based upon its valuation of the entire parcel at approximately $5.94 million, plus interest up to the time of the judgment.

However, plaintiffs did not build on parcel one as they were entitled to do pursuant to the Goga permit.[FN26] Instead, plaintiffs insisted that the DEQ's appeal of the nearly $4 million judgment against it also constituted an appeal of the permit and that the DEQ intended to revoke the permit if it prevailed on appeal. The DEQ **375 sent

plaintiffs a letter in which it stated that it did not believe that there should have been a judgment entered against the DEQ, and, therefore, that there should not have been damages assessed that the DEQ needed to mitigate by issuing the Goga permit. More importantly, however, the DEQ stated that the permit was valid and could be used by plaintiffs to begin development of parcel one. Yet plaintiffs continued in their assertion that the permit was subject to revocation because of the DEQ's appeal.

> FN26. The Ram's Horn restaurant and the JFK office building were constructed on the non-wetland (upland) portion of parcel one; plaintiffs did not require the Goga permit to build these structures.

As stated above, after this Court heard this case, and after our Supreme Court reversed the decisions of the *542 trial court and this Court, the case returned to the trial court after the United States Supreme Court denied a writ of certiorari. In the meantime, the Goga permit expired. After the case returned to the trial court in 1999, plaintiffs attempted to amend their complaint to raise claims in relation to the Goga permit and their claim that the permit was essentially an empty gesture. And the trial court originally, correctly, rejected plaintiffs' argument and stated that plaintiffs could not raise new claims centered on the DEQ's alleged failure to comply with the trial court's judgment. The trial court said that, instead of waiting six years to try and bring new

claims, plaintiffs should have gone before the trial court to address the alleged noncompliance.

Notwithstanding plaintiffs' attempt to mischaracterize their rights and the DEQ's conduct regarding the Goga permit, the DEQ reissued the expired Goga permit for five years. Nonetheless, plaintiffs continued to insist that the Goga permit was essentially worthless because the DEQ could revoke it if it prevailed on appeal. Plaintiffs made this assertion despite yet another letter from the DEQ in which it was stated that the DEQ had no intention of revoking the permit regardless of the outcome of the case.[FN27] Instead of developing the land as they clearly could have under the newly reissued permit, plaintiffs continued to maintain that the Goga permit was an empty gesture. On the other hand, the DEQ maintains that plaintiffs' actions are not motivated by a fear that the Goga permit might be revoked as much as they are by a desire to continue to accrue damages related to the alleged inability to develop their land.

> FN27. This letter stated, in relevant part, "As I have repeatedly expressed, it is not now and never was the intention of [the DEQ] to seek to revoke or otherwise limit the "Goga Plan" permit through appeal."

***543** After the second trial, the trial court reversed its initial decision and agreed with plaintiffs regarding the Goga permit. The trial court issued a brief opinion in

which it stated that it essentially was reaffirming its first judgment. After the trial court issued its opinion, plaintiffs moved for the entry of an order of judgment that included an award for the full value of parcel one. During a hearing on the motion, the DEQ reminded the trial court of the reissuance of the Goga permit and asked the trial court to take this into account, pursuant to M.C.L. § 324.30323, when it entered judgment, as the court had done after the first trial. However, this time, the trial court erroneously refused to take the Goga permit into account. Indeed, during the hearing, the trial court stated, in response to the DEQ's request, that it "[found] the state's handling of the Goga permit personally offensive."

Ultimately, the trial court entered judgment in the amount of the entire value of parcel one, approximately $5.94 million, plus interest, costs, and attorney fees, **376 which resulted in a total judgment in excess of $16 million, with additional interest payable from the date of judgment at the statutory rate. On appeal, plaintiffs continue to assert that the Goga permit's issuance by the DEQ was a hollow gesture that did not, in reality, mitigate any damages, while the DEQ insists that plaintiffs' claims that the permit is ineffective constitute a pretense for an attempt to accrue further damages.

III. STANDARDS OF REVIEW

We review a trial court's findings of fact for a clear error and disturb the trial court's findings only where we are "left with the definite and firm conviction that a ***544** mistake has been made." *Essexville v. Carrollton Concrete Mix, Inc.*, 259 Mich.App. 257, 265, 673 N.W.2d 815 (2003).[FN28]

> FN28. The DEQ urges us to set aside the clearly erroneous standard in favor of a review de novo. The DEQ argues that the trial court's findings are not entitled to deference because the trial court conducted the trial solely on the submission of *de benne esse* depositions, exhibits, and oral argument. However, the DEQ stipulated the entry of an order that specified exactly that procedure for trial. The DEQ cannot claim an error to which it contributed. *Farm Credit Services of Michigan's Heartland, PCA v. Weldon*, 232 Mich.App. 662, 683-684, 591 N.W.2d 438 (1998). Accordingly, we will not set aside the clearly erroneous standard here.

[2] Whether the government has effected a taking of one's property is a constitutional issue, U.S. Const., Am. V; Const. 1963, art. 10, § 2, which we review de novo. *People v. Cain*, 238 Mich.App. 95, 111, 605 N.W.2d 28 (1999).

IV. ANALYSIS

A. Trial Court's Compliance with the Supreme Court's Remand Order

[3][4][5] The DEQ correctly asserts that the trial court disregarded the specific remand instructions of our Supreme Court. " 'The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court.' " *People v. Fisher*, 449 Mich. 441, 446-447, 537 N.W.2d 577 (1995) (citations omitted); *Waatti & Sons Electric Co. v. Dehko*, 249 Mich.App. 641, 646, 644 N.W.2d 383 (2002). When an appellate court remands a case without instructions, a lower court has the "same power as if it made the ruling itself." *Fisher, supra* at 447, 537 N.W.2d 577. However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order. *Waatti & Sons, supra* at 646, 644 N.W.2d 383. "It is the duty of the lower court or ***545** tribunal, on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v. Gen. Motors Corp. (On Remand)*, 204 Mich.App. 509, 514, 516 N.W.2d 105 (1994).

1. The Trial Court's Findings of Fact on Remand Regarding the Value of the Denominator Parcel

During the first trial, the trial court considered only the value of parcel one in making its decision whether the DEQ's denial of a wetland permit constituted a taking. The trial court held that the DEQ's action deprived parcel one of all its economic value and that the DEQ had taken plaintiffs' property. Our Supreme Court, however, held, consistently with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), that a categorical taking had not occurred. *K & K II, supra* at 585-587, 575 N.W.2d 531. The Court then remanded the case to the trial court and clearly directed the trial court to make a new finding of fact with respect to the value of **377 plaintiffs' property and to include parcel two with parcel one when doing so. Furthermore, the trial court was clearly directed to make a finding of fact regarding whether parcel three should also be included in its analysis. *Id.* at 588, 575 N.W.2d 531. After the trial court made these new findings of fact, the trial court was to apply the three *Penn Central* factors, as mandated by our Supreme Court, to determine whether the DEQ's action here constituted a taking.

Unfortunately, on remand, the trial court failed to adhere to the Supreme Court's mandates. The trial court did make a finding of fact that parcel three should be included in its analysis during the new trial. Furthermore, the trial court

purportedly considered parcels one, two, and three together in its analysis, as our Supreme Court's decision required. However, the court ***546** rationalized its ruling by contending that our Supreme Court had not specifically disturbed its valuation of plaintiffs' property before and after the permit denial, simply reaffirmed its finding that the value of parcel one had diminished from nearly $6 million to zero. The court did this despite the fact that our Supreme Court essentially foreclosed any possibility of a finding that parcel one had a value of zero:

Even if we did limit our analysis to parcel one, the Court of Appeals conclusion that a categorical taking had occurred is not supported by the record. In its first opinion, the trial court stated: "While it is true that *some financial value will remain,* this Court finds that what little economic value remains is but a small fraction of the economic value the property would have had if all of it could be developed." (Emphasis added.) Thus, while the regulations may have diminished the value of plaintiffs' land, this diminution in value would not give rise to a categorical taking.... [*K & K II, supra* at 587 n. 13, 575 N.W.2d 531 (emphasis in the original).]

After a careful review of the trial proceedings, it is clear that the trial court failed to include the values of a Ram's Horn Restaurant and plaintiff JFK's office building, both located on upland portions of parcel one. Our Supreme

Court stated that it saw "no reason for [the office building and the restaurant] to be excluded from the taking analysis. They were both part of parcel one as originally purchased, and neither was sold or developed before the enactment of the regulations in question." *Id.* at 584 n. 9, 575 N.W.2d 531. The evidence presented during the trial after remand shows that the Ram's Horn and the JFK office building have a combined value of at least $1 million. Furthermore, our Supreme Court explicitly stated that "plaintiffs were not prohibited from developing the remaining upland on parcel one...." *K & K II, supra* at 587, 575 N.W.2d 531. Were the trial court to have complied ***547** with our Supreme Court's remand instructions, the trial court could not reasonably have reaffirmed its previous finding that the value of parcel one had been reduced to zero. For this reason alone, the trial court's holding must be reversed.

Additionally, the trial court then found that parcels two and three had a value of approximately $3 million. The trial court reasoned that this value was not high enough to "offset" the diminution in value that the court ruled parcel one had sustained. While the trial court held that the value of the entire "denominator parcel," consisting of parcels one, two, and three, had been diminished in value by sixty-seven percent, from approximately $9 million to just over $3 million, the trial court's analysis here centered on the value of parcel one. Rather than treating the three parcels as a single denominator parcel****378** as our Supreme Court

mandated, the trial court erroneously continued to treat parcel one as the relevant parcel, and only considered the values of parcels two and three to the extent that they might "offset" the diminution in the value of parcel one. This directly contradicts our Supreme Court's holding that any taking analysis here must look beyond the value of parcel one, and include the value of the entire denominator parcel. Accordingly, we conclude that the trial court did not comply with our Supreme Court's remand instructions with respect to determining the value of the denominator parcel. Because we so conclude, we hold that the trial court's findings of fact with respect to the value of the denominator parcel are clearly erroneous, and its decision is reversed.

2. Compliance with the Supreme Court's Order to Apply the Facts to *Penn Central*

The trial court's *Penn Central* analysis also failed to comply with the Supreme Court's remand instructions.***548** [FN29] A trial court must " comply strictly" with our Supreme Court's mandate. *Rodriguez, supra* at 514, 516 N.W.2d 105. Here, the trial court, without an explanation of what the factors mean, and, indeed, without so much as a ***549** citation of *Penn Central,* devoted not much more than a page of its analysis to this difficult, crucial, and dispositive analysis that was clearly mandated by our Supreme Court's remand order. Moreover, and dispositively, the trial court's ruling simply failed to properly apply the law to the facts.

FN29. The trial court's conclusions regarding the three factors read, in its entirety:

1. What is the Character of the Government Action in this Case?

In this case, the government activity, as noted, has taken the entire value of parcel one with the exception of two small areas that were developed prior to the wetland determination in this case. Thus the declaration of a wetland has taken, for all intents, the entire value of the parcel as previously found.

2. The Economic Effect of the Regulations.

This Court finds that the regulations in this case have deprived the Plaintiffs of the entire economic value of parcel one which is approximately two-thirds of the value of the entire denominator parcel.

3. The Interference with Investment-Backed Expectations.

Clearly, Plaintiffs intended to develop parcel one for economic gain. There is no question from the facts of this case that Plaintiffs have always intended to develop parcel one. They applied for zoning and dutifully paid commercial taxes on this parcel for many years. In addition, this

> property is not a characteristic wetland where an owner would likely be on notice of potential difficulties with development. The record showed an investment of several millions of dollars and the loss of a huge commercial development on parcel one. Applying the law to these facts demonstrates that the loss of parcel one far overshadows parcels two and three in area and in value.
>
> This Court finds that applying the test as required to the entire parcel under consideration shows a taking. This Court reaffirms its award as previously entered for Plaintiff [sic] together with costs and attorney fees. Interest shall run in the proscribed [sic] manner from the date of taking.

For these reasons and reasons we will discuss in greater detail below, we hold that the trial court did not comply with our Supreme Court's remand instructions with respect to its purported *Penn Central* analysis.

3. The Goga Permit and Mitigation

As outlined above, our Legislature, following the lead of the United States Congress, passed comprehensive legislation to protect Michigan's wetlands for the benefit of its citizens. This represents a clear public policy determination and statement of the importance to the citizens of this **379 state, including property owners, of

preserving wetlands for public welfare. M.C.L. § 324.30302. Moreover, the Michigan Constitution provides that "[t]he legislature shall provide for the protection of the air, water and other natural resources of this state...." Const. 1963, art. 4, § 52. In keeping with this mandate, the Legislature enacted the Natural Resources and Environmental Protection Act (NREPA), M.C.L. § 324.101 *et seq.*, which contains the WPA. The Legislature vests the DEQ with the responsibility for guarding our state's valuable natural resources on behalf of the citizens of this state. M.C.L. § 324.501.

In keeping with this constitutional and statutory scheme, our Legislature also expressed its intent that the DEQ should act to preserve *public funds* as well as *public resources* by establishing a statutory framework to mitigate damages to the state should a court find that the DEQ "went too far" in implementing the wetland ***550** regulations in a particular case. M.C.L. § 324.30323(3) represents our Legislature's well-considered plan to serve the dual purpose of having the DEQ protect the environment while also protecting the pocketbooks of our citizens by creating a mechanism to mitigate damages in those cases where courts find that the DEQ may have gone too far. Here, the DEQ, as our Legislature envisioned, acted properly under the statute to mitigate damages. The trial court should not have disregarded this legislative mandate where the DEQ, acting to preserve the citizens'

financial resources, agreed to an alternative use of the land, *as proposed by plaintiffs,* that would have allowed substantial development of the property at issue.

The courts of this state must recognize that our constitutionally and statutorily mandated agencies, like the DEQ, have a difficult duty in administering complex laws to preserve the environment for all citizens while respecting the important private property rights of those directly affected by the regulations. Our Legislature clearly saw the wisdom of anticipating that, in balancing these competing, important interests, the DEQ might err, at least in the judgment of a judge who is asked to review a specific application of the wetland regulations to a specific piece of property. And, when a judge rules against the DEQ, the state agency has the further task of again deciding how best to preserve taxpayer dollars and the environment by choosing the legislative options of purchasing the property, paying the amount of the lost economic value, or taking some other action, such as the issuance of an alternative permit that allows greater development, but with minimal damage to wetlands. Our courts should not ignore this complex, important statutory mitigation scheme. This legislative mandate is an important application of constitutional, statutory, and administrative law that *551 must be respected and administered by our courts in the best interests of the public. This, the trial court simply failed to do. The statute does not allow a trial court to

deny the state a chance to mitigate a regulatory taking judgment on the basis of the trial court's views of the DEQ.

Moreover, we agree with the trial court's original ruling with respect to the Goga permit, and further hold that plaintiffs waived this claim that the DEQ's appeal rendered the Goga permit invalid. If plaintiffs truly believed that the DEQ disobeyed that portion of the trial court's original order regarding the Goga permit, then plaintiffs should have sought the appropriate relief. Our review of the record reveals no attempt by plaintiffs to seek declaratory or other relief with respect to the Goga permit. Any claim that the DEQ's appeal rendered the Goga permit invalid here was waived by plaintiffs' own **380 conduct.[FN30] *Lewis v. LeGrow*, 258 Mich.App. 175, 210, 670 N.W.2d 675 (2003) ("[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.").

> FN30. We hold only that plaintiffs have waived any claim that the DEQ's appeal rendered the Goga permit invalid. Nothing in our holding prevents plaintiffs from pursuing their right to seek issuance of a Goga-type permit in the future.

B. The *Penn Central* Factors as Applied to This Case

[6] In *Penn Central,* the United States Supreme Court noted that "[t]he question of what constitutes a 'taking' ... has proved to be a problem of considerable difficulty." *Penn Central, supra* at 123, 98 S.Ct. 2646. The constitutional requirement that the state provide just compensation for the taking of one's property is " 'designed to bar Government from forcing some people alone to bear public ***552** burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 123-124, 98 S.Ct. 2646, quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The Court stated that taking determinations are "essentially ad hoc, factual inquiries...." *Penn Central, supra* at 124, 98 S.Ct. 2646.

[7] Since the United States Supreme Court's decision in *Penn Central,* and, indeed, since our Supreme Court's decision in *K & K II*, the United States Supreme Court has further explained its holding in *Penn Central.* A governmental regulation that deprives a landowner of "all economically beneficial use" of his or her property, is a categorical taking that requires compensation. *Palazzolo v. Rhode Island,* 533 U.S. 606, 615-616, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), citing *Lucas, supra.* Here, our Supreme Court rejected the trial court's ruling that the DEQ had effected a categorical taking of plaintiffs' property and remanded the case to the trial court with the instruction to

determine, pursuant to *Penn Central,* whether a taking had occurred despite the fact that plaintiffs' property had some, but because of the trial court's error, a yet to be determined, remaining value. The United States Supreme Court in *Penn Central* identified three factors to be examined when a court makes such a determination:

[1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [*Penn Central, supra* at 124, 98 S.Ct. 2646 (citations omitted).]

***553** As we will discuss in greater detail below, while no one of the three factors is dispositive in and of itself, a key factor in terms of wetland regulations is the third, the character of the government action. Where, as here, the regulation serves an important public interest and is widespread and ubiquitous, we conclude that, to sustain a regulatory taking claim, a plaintiff must prove that the economic impact and the extent to which the regulation has interfered with distinct investment-backed expectations are

the functional equivalent of a physical invasion by the government of the property in question.

1. Economic Impact of the Regulation

[8] A reduction in the value of the regulated property is insufficient, standing ****381** alone, to establish a compensable regulatory taking. *Penn Central, supra* at 131, 98 S.Ct. 2646. Indeed, the Supreme Court in *Penn Central* cited two of its previous opinions in which the Court refused to hold that there was a regulatory taking: *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), in which a zoning regulation resulted in a seventy-five percent diminution in value, and *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915), in which the regulation resulted in an 87.5 percent diminution.

Here, the DEQ's initial refusal to grant the requested permit unquestionably caused some decrease in the value of the property. After the second trial, the trial court held, erroneously, that the value had declined from a value before the denial of the permit of approximately $8.94 million to a value after denial of approximately $3 million, which represents a diminution of value of approximately sixty-seven percent. Even under this incorrect, inflated "damage calculation," plaintiffs ***554** failed to demonstrate a sufficient decrease in value to constitute a compensable

regulatory taking under *Penn Central; Euclid*, and *Hadacheck.*[FN31]

> FN31. Indeed, in *Lucas,* the Court noted that it is quite possible for a landowner to suffer a ninety-five percent diminution in value as the result of a regulatory action and nevertheless be unable to establish a regulatory taking. *Lucas, supra* at 1019 n. 8, 112 S.Ct. 2886.

However, as we discussed above, the trial court not only failed to account for the substantial value of the land that could have been developed pursuant to the Goga permit, worth at least $2.8 million, as it had after the first trial, but it also did not include the approximate $1 million value of the Ram's Horn and JFK office building. Accordingly, the proper value after denial for the denominator parcel would be approximately $5.8 to $6.8 million, which represents a decrease in value of approximately twenty-four to thirty-three percent. While this diminution of value is significant, we conclude that this figure most certainly does not weigh in favor of a finding that the DEQ's actions constitute a compensable regulatory taking.[FN32]

> FN32. This conclusion is supported by the fact that far greater diminutions of value have been found not to give rise to taking claims. See *Euclid, supra,* and *Hadacheck, supra;* see also *William C. Haas & Co., Inc. v. City & Co. of San Francisco,* 605 F.2d

> 1117, 1120 (C.A.9, 1979) (ninety-five percent diminution in value). Moreover, the Supreme Court has held time and again that even a significant diminution in value is not enough on its own to establish a regulatory taking. See *Penn Central, supra* at 131, 98 S.Ct. 2646; *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

Moreover, as we discussed above, plaintiffs could have developed the land pursuant to the Goga permit, and could possibly have increased the value of the land, or, at the very least further mitigated any loss in value but for their unjustifiable inaction.

***555** 2. Plaintiffs' Distinct Investment-Backed Expectations

[9] A court must also examine the extent to which the regulation has interfered with the property owner's "reasonable investment-backed expectations." *Palazzolo, supra* at 618, 121 S.Ct. 2448, citing *Penn Central, supra* at 124, 98 S.Ct. 2646. A key factor is notice of the applicable regulatory regime, here wetland regulations. The Supreme Court in *Palazzolo* rejected the principle that the purchase of property after the enactment of a wetland regulation absolutely bars a taking claim. *Palazzolo, supra* at 626-630, 121 S.Ct. 2448.[FN33] However, notice of such regulations**382 should nevertheless be taken into

account.[FN34] In her separate concurrence in *Palazzolo,* Justice O'Connor explained the importance of notice:

> FN33. Indeed, the Court stated, "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628, 113 S.Ct. 2264.
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> FN34. See Cordes, *The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation,* 43 Santa Clara L. R. 337, 376 (2003), citing the concurring opinion of Justice O'Connor in *Palazzolo, supra* at 635, 121 S.Ct. 2448; Justice Stevens, dissenting in part and concurring in part, *id.* at 637-645, 121 S.Ct. 2448; and Justice Ginsburg's dissent, *id.* at 645 n. 3, 121 S.Ct. 2448.

As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction....
The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, *it would be just as much error to expunge this consideration from*

the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial ***556** regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, *the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.* [*Palazzolo, supra* at 632-633, 121 S.Ct. 2448 (O'Connor, J., concurring) (emphasis added).]

In other words, equity is no better served by ignoring a claimant's knowledge of existing land-use regulations than it would be by holding that the claimant's knowledge of those regulations absolutely barred recovery regardless of how inequitable those regulations might be.

[I]f existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. [*Id.* at 635, 121 S.Ct. 2448.]

The WPA was originally enacted as the Goemaere-Anderson Wetland Protection Act in 1979.[FN35] Here, plaintiffs acquired title to the property in 1986. And, as plaintiffs themselves point out, JFK and Kosik are experienced commercial land developers with extensive knowledge of land-use regulations. [FN36] This knowledge and experience logically must be taken into account when determining what plaintiffs' reasonable, investment-backed expectations were with respect to the denominator parcel and in determining the extent of the WPA's effect on those expectations. Despite this admitted extensive commercial land development and *557 legal expertise, plaintiffs nonetheless claim that they were unable to discover a twenty-seven-acre area of wetlands. [FN37] Given the significant **383 area of wetland on the denominator parcel and plaintiffs' experience in commercial land development, together with their notice of wetland regulations, we conclude that a reasonable person with the extensive expertise that plaintiffs possess would have notice of the existence of both the wetlands and the WPA.

FN35. The WPA was later reenacted as Part 303 of the Natural Resources and Environmental Protection Act of 1994.

FN36. Indeed, Kosik is a lawyer by training.

FN37. Plaintiffs claim that the wetland was "not characteristic" because it was sandy; however, there is evidence, in the form of

> the DEQ's initial permit denial letter, that the wetland consisted of sand because "someone" had filled it in with sand. We also note that plaintiffs had begun attempting to develop the wetland area over an unspecified time before Waterford Township officials sent them a cease-and-desist letter.

As *Palazzolo* teaches us, the mere fact that plaintiffs had notice of the WPA does not end the inquiry with respect to their reasonable, investment-backed expectations and the effect of the governmental regulation challenged here. However, as Justice O'Connor explained, plaintiffs' notice of the WPA does help shape the analysis of whether plaintiffs' expectations were reasonable. Plaintiffs' alleged actual expectations involved building a forty-two-acre restaurant/sports complex on parcel one. However, with their experience, notice of the WPA, and the fact that twenty-seven acres of wetland existed on parcel one, this expectation was not reasonable. Looking at the denominator parcel as a whole, a reasonable expectation would be that plaintiffs would be able to develop the upland areas of the denominator parcel that are not wetlands. Indeed, there has been significant development on parcels two and three. On parcel one, there has been some development on the upland, including the construction of an office building and a restaurant. And the Goga permit allows plaintiffs to utilize the remaining upland, as well as ***558** some of the wetland acreage

(contingent upon the conversion of other, non-wetland acreage to wetland). The fact that plaintiffs have chosen not to make use of the Goga permit is wholly irrelevant to our analysis. However, when we consider the actual development of the entire denominator parcel, together with the development potential afforded plaintiffs by the Goga permit, it is clear that there has not been a significant negative effect on plaintiffs' *reasonable* investment-backed expectations.

Plaintiffs acquired the denominator parcel for the purpose of commercial development. On this parcel, they have constructed apartment homes, a restaurant, and an office building, with a total value of at least $5.8 million. Furthermore, the record shows that, while a significant portion of the parcel consists of wetland, there is nevertheless a significant area of upland that may be commercially developed. Plaintiffs claim, but failed to prove, that the DEQ's refusal to allow plaintiffs to fill in the entire wetland portion of the denominator parcel has thwarted their reasonable, investment-backed expectations. This simply is not supported by the evidence.

Accordingly, we hold that the effect of the governmental regulation on plaintiffs' reasonable, investment-backed expectations weighs against a conclusion that a taking has occurred.

3. Character of the Government Action

[10][11][12] This factor requires a court to place the challenged regulatory action along a spectrum ranging from an actually physical taking on one extreme, to a far-reaching, ubiquitous governmental regulation that provides all property owners with an "average reciprocity of advantage" on the other. As the United States ***559** Supreme Court explained, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public ****384** program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central, supra* at 124, 98 S.Ct. 2646. Clearly, this case does not involve a physical taking. The relevant inquiries are whether the governmental regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged here is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally. See *Walcek v. United States,* 49 Fed.Cl. 248, 270 (2001); *R & Y, Inc. v. Anchorage,* 34 P.3d 289, 298 (Alaska, 2001). [FN38] In *Penn Central,* the Supreme Court rejected the plaintiffs' argument that the New York City law that designated certain property as historic, and thus restricted the use and development of that property, served to single out the plaintiffs to carry the burdens of the regulation:

FN38. We are not bound by the decisions of the courts of other states; however, we may look to these regulatory taking decisions as persuasive authority. See *Farm Bureau Mut. Ins. Co. v. Buckallew*, 246 Mich.App. 607, 614 n. 6, 633 N.W.2d 473 (2001).

[A]ppellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal-all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole-which we are unwilling to do-we cannot conclude that the owners of the ***560** Terminal have in no sense been benefited by the Landmarks Law. [*Penn Central, supra* at 134-135, 98 S.Ct. 2646.]

Indeed, even the dissent in *Penn Central* noted in language equally applicable to this state's wetland regulations, that regulation in and of itself does not constitute a taking if it applies to a widespread group of landowners:

[A] taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

... For the reasons noted in the text, historic *zoning,* as has been undertaken by cities such as New Orleans, may well not require compensation under the Fifth Amendment. [*Id., supra* at 147, 98 S.Ct. 2646 (Rehnquist, J., dissenting) (citations deleted; emphasis in the original).]

Michigan's wetland regulations, like zoning regulations, are comprehensive and universal throughout this state. The federal government enacted the CWA, which permits the regulation of wetlands, and our Legislature enacted the WPA to protect wetlands in this state.[FN39] Our Legislature**385 made clear, within the very text of the WPA, that the regulation and protection of Michigan's *561 wetlands is intended to benefit the people of this state in a variety of ways. All property owners in this state share these benefits relatively equally, and all property owners and, all prospective owners are relatively equally subject to the burdens placed on much of the property in this state by the wetland regulations.

FN39. See *K & K I, supra* at 61, 551 N.W.2d 413 ("[T]he state has a legitimate interest in preserving and protecting wetlands."), citing *Attorney General ex rel Dep't of Natural Resources v. Huron Co. Rd. Comm.*, 212 Mich.App. 510, 516, 538 N.W.2d 68 (1995) (" '[t]he primary purpose of the WPA is to ensure that wetland habitats are preserved and protected' "); *Brace v. United States*, 48 Fed Cl 272, 278, 279 (2000) (noting that Congress passed the CWA in part to protect wetlands. The court noted that "[t]here is no question that the systemic destruction of the Nation's wetlands is causing serious, permanent ecological damage.").

Applying a similar analysis, the Alaska Supreme Court held that the regulatory action being challenged in *R & Y, Inc.* was a "wetlands preservation scheme which applies broadly to all landowners and which benefits both the public generally and the landowners in particular." *R & Y, Inc., supra* at 298. The court then noted that, as in this state, "[s]cientists and legislators have recognized the unique ecological and economic value that wetlands provide in protecting water quality, regulating local hydrology, preventing flooding, and preventing erosion." *Id.*[FN40]

FN40. It is worth noting that the Alaska Supreme Court held that the Alaska state

> constitution provides greater protections for property owners than the United States Constitution does under the Fifth Amendment. *R & Y, Inc., supra* at 293. Our Supreme Court has adopted the United States Supreme Court's *Penn Central* test, signaling that our Supreme Court has decided that the Michigan Constitution provides no greater protection for property owners than that provided by the Fifth Amendment. Though Alaska's constitution provides greater property protections than do the United States Constitution and the Michigan Constitution, the Alaska Supreme Court nevertheless held that enforcement of the challenged wetlands regulations did not effect a compensable taking of the plaintiff's property. *Id.* at 300.

The United States Court of Claims has similarly stated that "Congress attempted to protect wetlands while dealing with the concerns of private individuals." *Brace v. United States,* 48 Fed Cl 272, 279 (2000). The court also explained that "the existence of the wetland regulations in question ... indisputably ***562** serve an important public purpose-one which benefits plaintiffs as members of the public at large." *Walcek, supra* at 270.

Similarly, plaintiffs here cannot establish that the WPA's enforcement has the effect of singling out plaintiffs to bear the burden of a public benefit. What the federal Court of Claims said about federal wetland regulations is equally

applicable to Michigan: "the [CWA] and the wetlands regulations issued thereunder are generally applicable to all similarly situated property owners and can in no way be viewed as being directed at plaintiffs." *Walcek, supra* at 270.

Again, the Alaska Supreme Court's reasoning in rejecting the plaintiff's taking claim in *R & Y, Inc.*, applies here:

[T]he landowners were not singled out and made to suffer unduly burdensome economic loss. Instead, they incurred only relatively minor economic loss due to generally applicable wetlands restrictions which govern all land use ... and benefit all landowners, including these landowners, by preserving the ecologically and economically valuable functions of wetlands. [*R & Y, Inc., supra* at 300.] [FN41]

> FN41. Though the alleged economic effect in *R & Y* is less than the alleged economic effect here, the reasoning and analysis of *R & Y* are equally applicable here.

Here, plaintiffs are simply not being singled out by the WPA. The WPA provides a regulatory framework that applies to all property owners in this state for the benefit of all landowners. Indeed, were we to **386 uphold the trial court's award, we would, in effect, single out plaintiffs *to their benefit,* because compensating plaintiffs for the loss of value of their property, especially when it has a significant

amount of value and development potential remaining, would be tantamount to *563 making the plaintiffs exempt from the regulation of wetlands, to the detriment of others who bear the burden of wetland regulations throughout the state.

Accordingly, we conclude that the character of the government action was a wide-reaching, regulatory action that seeks to protect the rights of the public and to provide an "average reciprocity of advantage," and that this factor weighs heavily against finding that a compensable regulatory taking has occurred here.[FN42]

> FN42. Indeed, we note that the historical district preservation regulations upheld in *Penn Central* were far less universal and ubiquitous, and much closer to singling out individual property owners, than the wetland regulations challenged here. The Supreme Court in *Penn Central* nevertheless held that the regulation benefited the public as a whole, which weighed heavily against finding that a taking had occurred. See *Penn Central, supra* at 134-135, 98 S.Ct. 2646.

V. CONCLUSION

Because the challenged land-use regulation here, like traditional zoning, is comprehensive and universal so that plaintiffs are relatively equally benefited and burdened by

the challenged regulation as other similarly situated property owners, because plaintiffs purchased the land with knowledge of the regulatory scheme, and because plaintiffs have made and can make valuable use of their land despite the application of this regulation, we conclude that compensation is not required under *Penn Central.*

Therefore, we hold that plaintiffs have failed to establish that the DEQ's regulatory action here constituted a compensable regulatory taking of their property. Consequently, we reverse the trial court's judgment in favor of plaintiffs and enter judgment in favor of the DEQ. See MCR 7.216(A)(7).

**387 *564 APPENDIX

Tabular or graphic material set at this point is not displayable.

Mich.App.,2005.
K & K Const., Inc. v.
Department of Environmental Quality
267 Mich.App. 523, 705 N.W.2d 365

END OF DOCUMENT

STATE OF MICHIGAN
COURT OF CLAIMS

K & K CONSTRUCTION, INC.
JFK INVESTMENT CO., L.L.C.,
(Successors-in-interest to Resorts and Company and the JFK Company)
Plaintiffs,

File No. 88-012120-CM
Honorable William E. Collette

vs.

Court of Appeals No. 168393
Supreme Court No. 106712

THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
(Successor-in-interest to the DNR)
and STATE OF MICHIGAN,
Defendants.

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JUDGMENT OF THE COURT

At a session of said Court held in the
Courthouse located in the City of Mason
State of Michigan on Sept. 30, 2002.

PRESENT: HONORABLE _____,
COURT OF CLAIMS JUDGE

The Court being duly advised in the premises, and having reviewed the Plaintiffs' Motion for Entry of Judgment;

NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that judgment shall enter in favor of the Plaintiffs and against the Defendants, the State of Michigan and Department of Environmental Quality, jointly and severally, in the amount of Five Million Nine Hundred Forty-

One Thousand One Hundred Eighty-One Dollars ($5,941,181.00), together with interest, costs and attorney fees as set forth herein.

The Court orders that statutory interest pursuant to MCL 438.31 from the date of taking November 3, 1998, until the date of the Complaint was filed shall be taxed and statutory interest pursuant to MCL 600.6455 shall be taxed and compounded annually from the date of filing the Complaint until the Judgment is satisfied in full; the Court finds that interest appropriately taxed compounded annually on the judgment makes the judgment plus interest in favor of the Plaintiffs and against the Defendants, jointly and severally, in the amounts of Fifteen Million Eight Hundred Five Thousand Three Hundred Eighty-Eight Dollars and Eighty-Three cents ($15,805,388.83) through June 30, 2002, and such interest will continue to accrue and be taxed on the judgment until the judgment is satisfied in full.

The Court further finds pursuant to MCR 2.403(0)8 that Mediation/Case Evaluation sanctions are awardable in favor of the Plaintiffs and against the Defendants thereby entitling Plaintiffs to reasonable attorney fees and costs.

IT IS THEREFORE ORDERED AND ADJUDGED the Court taxes costs in the amount of One Hundred Fifteen Thousand Nine Hundred Seven Dollars and Ninety-Seven cents ($115,907.97) and attorney fees at the rate of Two Hundred Twenty-Five Dollars ($225.00) per hour for attorney Robert L. Bunting, and One Hundred Eighty Dollars

($180.00) per hour for attorney Richard L. Hoffman, One Hundred Eighty Dollars ($180.00) per hour for attorney Robert C. Davis and reduced to One Hundred Dollars ($100.00) per hour for Robert C. Davis and Richard L. Hoffman while assisting Mr. Bunting which total amount is Five Hundred Thirty-Eight Thousand Five Hundred Forty Dollars and Twenty-Five cents ($538,540.25) plus Seventy Thousand Three Hundred Dollars ($70,300.00) Dollars for attorney fees taxed in the first trial for a total amount of Six Hundred Eighty Thousand Eight Hundred Forty Dollars and Twenty-Five cents ($680,840.25). The costs and attorney fees are awarded to Plaintiffs against the Defendants, jointly and severally, with interest accruing from entry of judgment.

THEREFORE, the Court enters judgment in favor of the Plaintiffs and against the Defendants ordering the Defendants, jointly and severally to pay Sixteen Million Four Hundred Eighty-Six Thousand Two Hundred Twenty-Eight ($16,486,228.00) with interest accruing until judgment is satisfied in full.

This Judgment resolves the last pending claim and closes the case.

9/30/02

/s/ William Collette
JUDGE WILLIAM COLLETTE
COURT OF CLAIMS JUDGE

STATE OF MICHIGAN
COURT OF CLAIMS

K & K CONSTRUCTION, INC., et al.,
Plaintiffs,

File No. 88-12120-CM

v

OPINION AND ORDER
Judge William E. Collette

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and the STATE OF MICHIGAN,
Defendants.

This matter is on remand from the Michigan Supreme Court. This Court has been asked to review two questions:

1. Should parcel three be included in the denominator parcel for taking evaluation?
2. Applying the balancing analysis to the overall final parcel determined above has there been a taking requiring the payment of compensation to the Plaintiffs?

What is the Denominator Parcel for Takings Analysis?

This Court previously ruled that only parcel one should be considered when determining the denominator for takings analysis. After review, the Supreme Court overruled this Court and determined that parcels two and four must be included in the denominator. Further, that this Court should determine from the facts on the record whether or not parcel three should also be included in the denominator.

After this case was remanded to this Court, the parties have stipulated that parcel four should not be included in the denominator parcel since it was purchased after November 3, 1988, which has been already fixed as the date of taking in this matter.

While the above fact, in and of itself, does not swing the balance in Plaintiffs' favor in this Court's analysis, it does demonstrate the manner in which this case has been handled by the Defendants. Clearly, parcel four should never have been argued to be part of the denominator in this Court or the appellate courts, yet it was until recently so presented. The facts demonstrate that parcel four was purchased so that parcel two could be fully developed. Under the zoning laws of Waterford Township, Plaintiffs needed to have more acreage in order to build apartments on parcel two. Obviously, parcel one, being contiguous with parcel two, could have been used for this purpose if its zoning were compatible and if the township found a unity of use between

parcels one and two. Because this was not the case, Plaintiffs needed parcel four, bought after 1988, to make an economic use of parcel two.

Getting back to the issue posed by the Supreme Court, this Court must review the facts to determine if parcel three should be included with parcels one and two.

The facts demonstrate that parcels one, two and three were, at one time, part of a larger parcel of what was originally farm land along M-59 in Oakland County. Through a series of often confusing real estate transactions, the ownership of these three parcels came into the hands of Mr. Kosik and his wife. Through various means, the zoning of these parcels was altered to make parcel one commercial. Parcels two and three are zoned multiple family residential.

Parcel one is located along M-59, and is one of the last (if not the last) undeveloped pieces of land along that highway in Waterford Township. Obviously, its retail value in 1988 was tremendous. Previously this Court determined that the 55 acres were worth $5,941,181 as of November 3, 1988. This value has not been disturbed by the Supreme Court, therefore, this Court will continue to rely upon that figure for a takings analysis of parcel one.

This Court also determined previously that the configuration of the wetlands on parcel one is such that, except for some rather limited areas around the edges, the entire 55 acres is rendered unusable for any meaningful commercial development by the Plaintiffs.

On the other hand, testimony has demonstrated that both parcel two and parcel three are developed with significant apartments constructed on them. These parcels, because of their location, have been and are commercially viable. This Court has previously held that a part of parcel two is also a wetland that connects with parcel one. There are no wetlands on parcel three.

Testimony has been clear that all three parcels, while adjoining each other, have been developed along distinctly differing paths. Obviously, it would have been commercially unreasonable to contemplate apartments along M-59 both economically and esthetically. The record also demonstrated that parcel three was in the stages of development well before November 3, 1988, and thus it is clear that the developer treated it as a separate unit well before any determination of the extent of the wetlands on parcel one occurred. This is important here since if the Plaintiffs had been aware of the potential wetland problems with parcel one before work on parcel three had began, it may have been possible to develop a plan to use at least some of parcel one in conjunction with parcels two and three. Also, later some part may well have been usable to add acreage to the overall land area of parcel two to avoid the need to buy parcel four.

This Court also notes that parcel three was really part of another complex of apartments built across a major street and were never part of a plan to develop parcel one. Also,

when parcel three was sold it was sold with another parcel across the street.

While the above factors are important, it is apparent that in looking at the overall prior ownership of parcels one, two and three, it is this Court's opinion that all should be considered together for the takings analysis ordered by the Supreme Court. The facts clearly show that the Plaintiffs here, in one way or another, were continually involved in the purchase and development of each of the parcels. Each was once part of a larger whole and were developed at least in part by Plaintiffs. Thus, for a takings analysis of economic viability, this Court will consider them as one.

The facts have shown that parcel one has huge economic value even in its undeveloped state, given its prime location along M-59 in Waterford Township. Throughout its ownership by the Plaintiffs it has been considered as such and maintained with development in mind. The facts demonstrate that for over 25 years Plaintiffs have dutifully paid commercial taxes on it They also sought and were granted commercial zoning on the parcel and often mowed it to keep the area from being unsightly.

Plaintiff presented expert testimony before this Court on remand that has demonstrated that the apartments on parcels two and three, while substantial do not overshadow the economic impact on the overall losses to Plaintiff by the taking of parcel one.

This Court has been directed to apply a balancing analysis to this case. Our Supreme Court has wisely determined that there must be an examination of three factors: 1) The character of the government action; 2) The economic effect of the regulation on the claimant; and 3) The extent to which the regulation interfered with distinct investment-backed expectations. In making analysis, this Court has to compute the actual value of all of the property and determine and apply the above test.

In determining the value to be applied to the overall parcels one, two and three combined, this Court is mindful that there has been significant changes in some of the property since the original taking and trial in this case. Parcel four has been bought. Apartments have been constructed on parcel two. Parcels two and three have been sold. This Court believes that these transactions should be considered by this Court in determining the value to be placed on parcels two and three. Thus, if Plaintiffs had realized significant economic profit from the sales of these properties, that higher value might well off-set substantially the loss of viability of parcel one.

The evidence demonstrates that the apartments on parcel three, which were already built in 1988, were sold along with those on parcel two for little or no actual profit. It would seem to this Court that we must then take the land value for parcel two as of 1988 which this Court believes to be $398,000 based on the testimony of Mr. Stoppert and Mr.

Mawson. This Court also determines that the apartments on parcel three had a value of $3,000,000 in 1988 based on the testimony of the same experts. Thus, to compute the actual value of the overall parcel in 1988, we add together the values above to the $5,941,181 this Court has already fixed as to parcel one. This total is $9,339,181. This Court finds this to be the overall value of the property.

1. What is the Character of the Government Action in this Case?

In this case the government activity, as noted, has taken the entire value of parcel one with the exception of two small areas that were developed prior to the wetland determination in this case. Thus the declaration of a wetland has taken, for all intents, the entire value of the parcel as previously found.

2. The Economic Effect of the Regulations.

This Court finds that the regulations in this case have deprived the Plaintiffs of the entire economic value of parcel one which is approximately two-thirds of the value of the entire denominator parcel.

3. The Interference with Investment-Backed Expectations.

Clearly, Plaintiffs intended to develop parcel one for economic gain. There is no question from the facts of this case that Plaintiffs have always intended to develop parcel one. They applied for zoning and dutifully paid commercial taxes on this parcel for many years. In addition, this property

is not a characteristic wetland where an owner would likely be on notice of potential difficulties with development. The record showed an investment of several millions of dollars and the loss of a huge commercial development on parcel one. Applying the law to these facts demonstrates that the loss of parcel one far overshadows parcels two and three in area and in value.

Conclusion

This Court finds that applying the test as required to the entire parcel under consideration shows a taking. This Court reaffirms its award as previously entered for Plaintiff together with costs and attorney fees. Interest shall run in the proscribed manner from the date of taking.

Dated: 5/24/02 /s/ William E. Collette
William E. Collette (P12056)

STATE OF MICHIGAN
COURT OF CLAIMS

K & K CONSTRUCTION, INC., et al.,
Plaintiffs,

File No. 88-12120-CM

v

PROOF OF MAILING
Judge William E. Collette

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and the STATE OF MICHIGAN,
Defendants.

I certify that on this date copies of the Opinion and Order dated May 24, 2002 were served upon S. Peter Manning and Robert L. Bunting by ordinary mail.

/s/ Shawn Collins
Shawn Collins, Judicial Assistant

Dated: May 24, 2002

525 U.S. 1034, 119 S.Ct. 577,
142 L.Ed.2d 481 67 USLW 3363

Supreme Court of the United States

K & K CONSTRUCTION, INC., et al., *petitioners,*
v.
MICHIGAN DEPARTMENT OF NATURAL RESOURCES, et al.
No. 97-1957.
Nov. 30, 1998.

Former decision, 525 U.S. 819, 119 S.Ct. 60.
Petition for rehearing **denied.**

Copr. (C) West 2006 No Claim to Orig.
U.S. Govt. Works U.S., 1998

K & K Const., Inc. v.
Michigan Dept. of Natural Resources, et al.

525 U.S. 1034, 119 S.Ct. 577, 142 L.Ed.2d 481,
67 USLW 3363

Briefs and Other Related Documents (Back to top)

o 1998 WL 34103491 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari (Jun. 03, 1998) Original Image of this Document with Appendix (PDF)

END OF DOCUMENT

525 U.S. 819, 119 S.Ct 60, 142 L.Ed.2d 47,
66 USLW 3790, 67 USLW 3230,
67 USLW 3213, 67 USLW 3009

Briefs and Other Related Documents

Supreme Court of the United States
K & K CONSTRUCTION, INC., et al., petitioners,
v.
MICHIGAN DEPARTMENT OF NATURAL RESOURCES, et al.
No. 97-1957.
Oct. 5, 1998
Rehearing Denied Nov. 30, 1998
See 525 U.S. 1034, 119 S.Ct. 577.

Case below, 456 Mich. 570, 575 N.W.2d 531.

Petition for writ of certiorari to the Supreme Court of Michigan **denied**.

Copr. (C) West 2006 No Claim to Orig.
U.S. Govt. Works U.S., 1998

K & K Const., Inc. v.
Michigan Dept. of Natural Resources

525 U.S. 819, 119 S.Ct 60, 142 L.Ed.2d 47,
66 USLW 3790, 67 USLW 3230,
67 USLW 3213, 67 USLW 3009

Briefs and Other Related Documents (Back to top)

• 1998 WL 34103491 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari (Jun. 03, 1998) Original Image of this Document with Appendix (PDF)

END OF DOCUMENT

456 Mich. 570, 575 N.W. 2d 531,
28 Envtl. L. Rep. 251,156

Briefs and Other Related Documents

Supreme Court of Michigan.
K & K CONSTRUCTION, INC., J.F.K. COMPANY, and Resorts and Company,
Plaintiffs-Appellees,
v.
DEPARTMENT OF NATURAL RESOURCES,
Defendant-Appellant.
Docket No. 106712.
Calendar No. 13.
Argued Nov. 5, 1997.
Decided March 24, 1998.

Landowners filed action against Department of Natural Resources (DNR), alleging that denial of their application for permit to fill wetlands constituted a taking. The Court of Claims, William E. Collette, J., ruled that DNR was required to compensate owners. DNR appealed. The Supreme Court, Michael F. Cavanagh, J., held that: (1) at least three parcels, rather than one parcel, were to be included in denominator parcel; (2) owners' land was not categorically taken; and (3) trial court was required to determine if taking had occurred under balancing test.

Reversed in part and remanded.

West Headnotes

[1] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

In case of a categorical taking, which is a taking that deprives owner of all economically beneficial or productive use of land, reviewing court need not apply case-specific analysis, and owner should automatically recover for taking of his property. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[2] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other

Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))

Person may recover for categorical taking in case of physical invasion of his property by government, or where regulation forces owner to sacrifice all economically beneficial uses of his land in name of common good. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[3] Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))

In analyzing whether categorical taking has occurred in situation in which owner has not been deprived of all economically beneficial or productive use of land, reviewing court must engage in an ad hoc, factual inquiry, centering on three factors: (1) character of government's action, (2) economic effect of regulation on property, and (3) extent by which regulation has interfered with distinct,

investment-backed expectations. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[4] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

In conducting takings analysis, courts should not divide a single parcel of land into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[5] Eminent Domain 148 ⚿2.2

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.2 k. Particular Acts and Regulations. Most Cited Cases
(Formerly 148k2(1))

Three contiguous parcels, rather than one parcel alone, were part of the denominator to be considered in conducting takings analysis; same party was the title owner of all three parcels, and comprehensive development plan

existed encompassing all three parcels. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[6] Eminent Domain 148 ⚿221

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k213 Assessment by Jury
148k221 k. Questions for Jury. Most Cited Cases

Determining size of denominator parcel to be analyzed in takings analysis is inherently a factual inquiry. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[7] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Failure to include parcel of land in development plan should not, by itself, exclude that parcel from consideration as part of the denominator in conducting takings analysis. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[8] Eminent Domain 148 ⚿2.2

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.2 k. Particular Acts and Regulations. Most Cited Cases
(Formerly 148k2(1))

Although there is no single set of factors or "test" that trial court should apply when determining extent of the denominator parcel in conducting takings analysis, court should consider extent of plaintiffs' ownership interest in relevant parcels, contiguity of parcels, and extent to which parcels have been treated as a single unit; some other factors that may be instructive include whether relevant parcels were part of original parcel purchased, date of parcels' purchase and extent of development relative to date of enactment of challenged regulations, and zoning of parcels. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[9] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

(Formerly 148k2(1))

Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))

Regulatory taking exists when: (1) regulation fails to advance a legitimate state interest, or (2) regulation denies an owner economically viable use of his land. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[10] Eminent Domain 148 ⚿2.27(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases
(Formerly 148k2(10))

Denial of permit to fill wetlands on owners' property, on ground that portion of property was protected under Wetland Protection Act (WPA), did not constitute a

categorical taking of property; owners were not prohibited from developing remaining upland on property, and owners' second permit application clearly contemplated such development. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2; M.C.L.A. § 281.701 et seq.

[11] Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))

Question whether regulation denies owner economically viable use of his land, and thus constitutes a taking, requires at least a comparison of value removed with value that remains. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

**533*571 Robert L. Bunting, Oxford, for plaintiffs-appellees.

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, A. Michael Leffler, Assistant in Charge, and Stanley F. Pruss and S. Peter Manning, Assistant Attorneys General Lansing, for defendant-appellant.

John F. Rohe and Gail S. Gruenwald, Petoskey, amicus curiae for Tipp of the Mitt Watershed Council.

Chris A. Shafer, Lansing, amicus curiae for Michigan Natural Areas Council.

Olson, Noonan, Ursu & Ringsmith, P.C. by James M. Olson, John D. Noonan, and Christopher M. Bzdok Traverse City, amicus curiae for Michigan Environmental Council, League of Women Voters of Michigan, Sierra Club, West Michigan Environmental Action Council, Michigan Land Use Institute, Ecology Center of Ann Arbor, Mid-Michigan Action Council, Citizens Against Pollution, Citizens for Alternatives to Chemical Contamination, Eastern Michigan Environmental Action Council, and Clean Water Action Council.

Lois J. Schiffer, Assistant Attorney General, W. Francesca Ferguson, Assistant United States Attorney, and Edward Shawaker and Timothy J. Dowling, Attorneys, Environment and Natural *572 Resources Division Washington, DC, Jonathan Z. Cannon, General Counsel, and David F. Coursen, Attorney, Office of General Counsel, amicus curiae for United States Environmental Protection Agency.

Marc K. Shaye, Troy, James S. Burling, and Stephen E. Abraham Sacramento, CA, amicus curiae for Pacific Legal Foundation.

Kohl, Secrest, Wardle, Lynch, Clark & Hampton by Gerald A. Fisher (Susan Marie Connor, of counsel, American

Planning Association, Chicago, IL), Farmington Hill, amicus curiae for Michigan Municipal League, Michigan Townships Association, and Public Corporation Law Section of the State Bar of Michigan.

Butzel Long by William R. Ralls, John H. Dudley, Jr., and Steven D. Weyhing, Lansing, amicus curiae for Michigan Peat, Inc.

Twohey Magginni, P.L.C. by Patrick M. Muldoon and Ralph Wyngarden (John D. Echeverria and Enrico G. Nardone, of counsel, Washington, DC), Grand Rapids, amicus curiae for Michigan Audubon Society, Detroit Audubon Society, and National Audubon Society.

Glenn P. Sugameli, Washington, DC, Carol Bambery, Lansing, and M. Cameron Davis, Ann Arbor, amicus curiae for Michigan United Conversation Clubs and National Wildlife Federation.

Opinion

MICHAEL F. CAVANAGH, Justice.

This case requires us to decide whether the denial of a permit to fill wetlands on the plaintiffs' property constitutes a regulatory taking of the property without just compensation. On two separate occasions, plaintiffs applied to the Department of Natural Resources for a permit to fill wetlands on a portion of their property so that they could commercially develop the land. Both permits were denied, *573 and the plaintiffs filed the instant action, claiming that the permit denials constituted a regulatory taking of their land. The trial court found that the permit denials effectively rendered part of the plaintiffs' land worthless; therefore, the DNR was required to compensate the plaintiffs. The Court of Appeals affirmed. We granted leave, and we now reverse in part and remand the case to the trial court.

I

Plaintiffs J.F.K. Company and Resorts and Company own eighty-two acres of property near M-59 in Waterford Township. J.F.K. is a Michigan limited partnership, consisting of the five children of Joseph and Elaine Kosik. Resorts and Company is a Michigan copartnership, consisting of Wisconsin Resorts, Inc., and J.F.K. K & K Construction Co., Inc., is a Michigan corporation. Mr. Kosik and his son are the sole shareholders of K & K. It has

no ownership interest in the property, but it has contracted with the owners to build a C.J. Barrymore's restaurant and sports complex on the property.

**534 Mr. and Mrs. Kosik originally acquired the property in question during 1976. The property was transferred to J.F.K. by quitclaim deed in 1986 so J.F.K. could develop the land. The Kosiks retained a reversionary interest in part of the property, conditioned upon J.F.K.'s ability to obtain financing for the project. Resorts and Company obtained its interest in the property about the same time.
The trial court found that the property consists of four defined parcels, all of which are contiguous. Parcel one consists of approximately fifty-five acres, twenty-seven acres of which are wetlands. It is zoned *574 for commercial use.[FN1] Parcel two (sixteen acres) is directly south of parcel one. It contains a small portion of the wetlands. Parcel three (9.34 acres) is directly south of parcel two, and does not contain any wetlands. Parcel four (3.4 acres) borders the south side of parcel one, and the east side of parcel two. It is also free of wetlands. Parcels two, three, and four are zoned for multiple family residential housing (R-2). Parcel three has already been developed; parcels two and four have not been developed.

FN1. Two portions of parcel one have already been developed. The J.F.K. office building has been built on part of the parcel

> that borders North Oakland Boulevard, and a Ram's Horn restaurant has been developed and sold from a portion of the land that borders M-59.

Plaintiffs' original plan, referred to as the "Barrymore Plan," was to build a restaurant and sports complex on fortytwo acres of parcel one, and several multiple-family residential structures with a storm-water retention pond on parcels two and four. Pursuant to this plan, plaintiffs applied for a permit to fill part of parcel one in June 1988. The DNR denied the permit, finding that approximately twenty-eight acres of the property were protected wetlands under the Wetland Protection Act (WPA), M.C.L. § 281.701 *et seq.;* M.S.A. § 18.595(51) *et seq.*, since repealed and replaced. Plaintiffs did not file an administrative appeal. Instead, they filed the instant action in December 1988. In May 1990, plaintiffs submitted a second application for a permit to fill approximately three acres of wetland, while mitigating the fill by converting five acres of upland to wetland. This second application, referred to as the "Goga Plan," would have developed the primarily upland ring around the wetland, while leaving most of the wetland intact. The second permit ***575** was also denied, and again no administrative appeal was taken.

The case was tried in December 1991. The only issue before the court was whether the permit denials constituted

takings of the plaintiffs' property. The trial court held that parcel one was the only property relevant to the taking analysis, and that denial of the permit to construct the restaurant and sports complex effectively rendered plaintiffs' property commercially worthless. The DNR was required to compensate plaintiffs for the full value of their property.

Once faced with a substantial adverse judgment, the DNR attempted to mitigate the loss in value of the property by allowing development to commence under the "Goga Plan." FN2 Even so, the trial court held that the DNR owed plaintiffs damages both for a "temporary" taking of the land that could now be developed under the Goga Plan, and also for the full value of the wetlands that were not usable under the Goga Plan. The trial court ultimately decided that the DNR was liable for approximately $3.5 million plus interest for the unusable interior wetlands, and approximately $500,000, plus interest for the temporary taking. The Court of Appeals affirmed the trial court's judgment. 217 Mich.App. 56, 551 N.W.2d 413 (1996).

> FN2. The trial court was required by statute to give defendant the option of mitigating its damages. M.C.L. § 324.30323; M.S.A. § 13A.30323 states that once the court has determined that the department's actions constitute a taking, the court shall order the

> department, at the department's option, to do one or more of the following:
>
> (a) Compensate the property owner for the full amount of the lost value.
>
> (b) Purchase the property in the public interest ...
>
> (c) Modify its action or inaction with respect to the property so as to minimize the detrimental affect to the property's value.

***576 II**

The Fifth Amendment of the United States Constitution provides in part: "nor ****535** shall private property be taken for public use, without just compensation." [FN3] Similarly, the Michigan Constitution provides:

> FN3. The Fifth Amendment's Taking Clause is applied to the states through the Fourteenth Amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978).

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be

determined in proceedings in a court of record. [Const. 1963, art. 10, § 2.]

The United States Supreme Court has recognized that the government may effectively "take" a person's property by overburdening that property with regulations. As stated by Justice Holmes, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 107 S.Ct. 1232, 1242, 94 L.Ed.2d 472 (1987).

The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically*577 beneficial or productive use of land," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992); or (b) a taking

recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[1][2][3] In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas, supra* at 1015, 112 S.Ct. at 2893. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good...." *Id.* at 1019, 112 S.Ct. at 2895 (emphasis in original). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir [y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659.

The trial court found that the WPA had effectively eliminated the economically viable use of plaintiffs' land; therefore, plaintiffs were due compensation for a taking of their property. Significantly, the trial court only

considered the effect of the regulations on parcel one of plaintiffs' property, finding that parcel one was the only relevant parcel for the taking analysis. The Court of Appeals upheld the award of damages to the plaintiffs for a taking. It held that the WPA eliminated all economically viable use of the plaintiffs' ***578** land, which meant that plaintiffs could recover categorically for the taking under the United States Supreme Court's decision in *Lucas*.[FN4]

> FN4. *Lucas* was decided only a few months before the trial judge issued his opinion in the instant case, and the opinion does not discuss the categorical-taking standard. However, the Court of Appeals found the categorical-taking analysis applicable on the basis of the trial court's findings.

III

Before we decide whether the regulations imposed on plaintiffs' property constitute a taking, we must first address an important preliminary matter. The first step in our analysis is to determine which parcel or parcels owned by plaintiffs are relevant for the taking inquiry. The determination of what is referred to as the "denominator parcel" is important because it often affects the analysis****536** of what economically viable uses remain for a person's property after the regulations are imposed. Plaintiffs urge us to focus our analysis only on parcel one,

while defendant argues that we must look at all four of plaintiffs' parcels as a single unit.

[4] One of the fundamental principles of taking jurisprudence is the "nonsegmentation" principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. *Keystone*, 480 U.S. at 498, 107 S.Ct. at 1249; *Korby v. Redford Twp.*, 348 Mich. 193, 198, 82 N.W.2d 441 (1957). Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130, 98 S.Ct. at 2662. Rather, we must examine ***579** the effect of the regulation on the entire parcel, not just the affected portion of that parcel.

The denominator parcel is also not limited to each parcel of property. As explained by the United States Court of Appeals for the Federal Circuit in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (C.A.Fed., 1993):

Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto,

constitute a taking in every case where it exercises its statutory authority. [Citations omitted.]

This Court has previously found the nonsegmentation principle applicable to two adjoining parcels of property with unity of ownership. *Bevan v. Brandon Twp.*, 438 Mich. 385, 475 N.W.2d 37 (1991). In *Bevan*, the plaintiffs purchased two contiguous lots of land separately. The plaintiffs were only allowed to build a single house on the two lots because of township land-use ordinances adopted after they had purchased the property. The plaintiffs sued, claiming that the regulations constituted an unconstitutional taking of their property. The lower courts agreed with them, finding that the regulation of the property constituted a regulatory taking of one of plaintiffs' two parcels. This Court reversed, stating:

As a general rule, a person's property should be considered as a whole when deciding whether a regulatory taking has occurred. 1 Rathkopf, Zoning and Planning, § 6.07(5), p. 6-45.

* * * * * *

***580** This Court has recognized that contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances, despite the owner's division of the property

into separate, identifiable lots. [438 Mich. at 393, 395, 475 N.W.2d 37.]

The Court refused to apply the taking analysis to only one of the two lots; instead, it viewed the property "in its entirety." *Id.* at 397, 475 N.W.2d 37.

[5] In the present case, the Court of Appeals noted that plaintiffs' parcels were contiguous, just as those in *Bevan.* However, the Court found *Bevan* distinguishable because the property in that case concerned two parcels under the same ownership and subject to a single-zoning scheme. 217 Mich.App. at 65, 551 N.W.2d 413. While we recognize that this case is not factually the same as *Bevan,* the principles underlying the decision in *Bevan* require us to conclude that the denominator parcel is more than just parcel one of plaintiffs' property. The relevant denominator in this case includes at least parcels one, two, and four.

[6] Determining the size of the denominator parcel is inherently a factual inquiry. As explained in *Ciampitti v. United States,* 22 Cl Ct 310, 318-319 (1991):

Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many

others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given **537 the entire factual and regulatory environment.

*581 In this case it is neither realistic nor fair to consider only parcel one for purposes of the taking analysis. Parcels one, two, and four are bound together through their contiguity, the unity of J.F.K.'s ownership interest in all three of these parcels, and plaintiffs' proposed comprehensive development scheme. Thus, the Court of Appeals erred when it concluded that it was proper for the trial court to consider only parcel one in the taking analysis.

First, there is no dispute that parcels one, two, and four are contiguous. Second, J.F.K. had an ownership interest in parcels one, two, and four. At the time the instant litigation was started, as well as when the permits were submitted to and denied by the DNR, J.F.K. was the title owner of all three parcels of property.[FN5] As explained in *Bevan,* contiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis.[FN6]

FN5. The trial court recognized the fact that J.F.K. is the titled property owner of parcel one. However, it found that there was an "equitable lien on the title to the property in favor of Mr. and Mrs. Kosik." At the very least, the record indicates that J.F.K. shares a joint ownership interest in the property with Mr. and Mrs. Kosik. We find this joint ownership interest, combined with the fact that J.F.K. was the sole titled owner of the property at the time that the alleged taking occurred, sufficient to create a common ownership interest in all of parcels one, two, and four.

FN6. We acknowledge that these three parcels of property do have different zoning classifications. However, the fact that plaintiffs intended to use all three of them in a single development plan negates the fact that they were zoned differently, in this case. See *Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528 (1996) (although zoning changes by the city resulted in three different zoning classifications on the plaintiff's parcel of land, the entire 10.4 acres of the parcel were considered relevant to the taking analysis rather than the 8.2 acres that were rezoned).

Third, the connection between parcels one, two, and four is further solidified by plaintiffs' comprehensive development plans. The plaintiffs' proposed use of the property is

highly relevant to establishing the ***582** denominator parcel. Where "a property owner treats a series of properties as one income-producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the Government action," rather it is the loss as it relates to the value of the entire unit. *Forest Properties, Inc v. United States*, 39 Fed.Cl. 56, 73 (1997). Both permit applications filed by plaintiffs with the DNR contemplated a comprehensive development using part of parcels one, two, and four.[FN7] In a similar situation, the United States Court of Claims held that a plaintiff may not separate a certain lot of property from others that he owned with regard to his taking claim when he had previously treated them as "a single parcel for purposes of purchase and financing." *Ciampitti, supra* at 320. Indeed, it is inappropriate to allow a person to "sever the connection he forged when it assists in making a legal argument." *Id.* Here, the plaintiffs forged a connection between parcels one, two, and four through the proposed development scheme and permit applications.[FN8] It would be inappropriate***583** to allow plaintiffs to sever this connection now that it makes their legal argument stronger.

> FN7. The first permit filed with the DNR does not clearly state how many acres of plaintiffs' property were going to be involved in the development. However, there was testimony at trial explaining that

along with the construction of the C.J. Barrymore's restaurant and sports complex on parcel one, plaintiffs planned on building a storm-water retention pond and multiple-family residential structures on parcels two and four. The second permit application also contemplated using parcels two and four as part of the development. It described the proposal as "development of a 72.2 acre parcel which includes commercial, general office, multiple housing and senior citizen congregate care facilities."

FN8. Just as in the case at hand, the plaintiff's suit in *Forest Properties* was for the taking of 5.4 acres of lake bottom property when their permit application described the project as "53.36 acres existing plus 5.4 acres lake bottom." *Forest Properties* at 63. The Court of Claims found this as evidence of the unity of "development and the economic expectations" of the plaintiff. *Id.*

Finally, the reliance of the Court of Appeals on *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (C.A.Fed., 1994), is misplaced. In *Loveladies,* the plaintiffs agreed to convey 38.5 acres of wetland to the state in return for a permit to develop the remaining 12.5 acres of their land. However, the plaintiffs**538 were denied a federal permit to fill the 12.5 acres on the basis of the state's recommendation to the Army Corps of Engineers that the

permit be denied. In the subsequent action, the defendants argued that the court should consider all fifty-one acres of the plaintiffs' property for the taking analysis, not just the 12.5 listed in the permit application. The court rejected the defendants' argument, explaining that it was illogical to "require *Loveladies* to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers." *Id.* at 1181. Similarly, it seems illogical in this case for J.F.K. to apply for permits to develop parcels one, two, and four, and then for the Court to consider only parcel one in the taking analysis.

We conclude that the lower courts erred in limiting their analysis of the taking claim to parcel one. In this case, the plaintiffs proposed a comprehensive development, using parts of parcels one, two, and four of the property. The taking claim is based on the DNR's refusal to issue permits to allow this comprehensive development. Thus, this case is analogous to *Bevan, ***584** supra.* At the least, all three of plaintiffs' parcels of property should be considered in the taking analysis.[FN9]

> FN9. In this case, two parts of parcel one as originally purchased have been developed. Defendant argues that the trial court failed to consider these two parcels in its ruling on the value of parcel one, but it is unclear from

> the trial court's opinion whether this was the case. We see no reason for these two parts of parcel one to be excluded from the taking analysis. They were both part of parcel one as originally purchased, and neither was sold or developed before the enactment of the regulations in question. See *Blue Water Isles Co. v. DNR*, 171 Mich.App. 526, 536, 431 N.W.2d 53 (1988) (two parcels sold to a third party before regulatory action was considered in taking analysis).

We note that defendant has urged us also to include parcel three as part of the denominator parcel. Parcel three is contiguous with the other parcels in this case, and J.F.K. does have an ownership interest in parcel three. However, the record is unclear with respect to the extent of J.F.K.'s ownership interest in parcel three. More importantly, parcel three was not included in plaintiffs' development plan; it had previously been developed.

[7][8] However, this should not end the inquiry. The failure to include a parcel of land in a development plan should not, by itself, exclude that parcel from consideration as part of the denominator. To so conclude would encourage piecemeal development. Thus, while we can safely state that the denominator parcel includes parcels one, two, and four, we believe it is inappropriate to conclude one way or the other with regard to parcel three.

On remand, we instruct the trial court to determine the extent of J.F.K.'s ownership interest in parcel three, and whether it is sufficiently connected to the other parcels to conclude ***585** that all four parcels should be considered in the taking analysis.[FN10]

> FN10. There is no single set of factors or "test" that the trial court should apply when determining the extent of the denominator parcel. Obviously the extent of plaintiffs' ownership interest in the relevant parcels, the contiguity of the parcels, and the extent to which the parcels have been treated as a single unit should all be considered. Some other factors that may be instructive include: whether the relevant parcels were part of the original parcel purchased, see *Ciampitti, Blue Water Isles Co.,* and *Loveladies Harbor, supra;* the date of the parcels' purchase and the extent of development relative to the date of enactment of the challenged regulations, *Loveladies Harbor, supra;* and the zoning of the parcels, *Bevan, supra.*

IV

[9] Next, we address the Court of Appeals conclusion that the regulation of plaintiffs' land constituted a regulatory taking. As explained in part II, a regulatory taking exists when: (1) the regulation fails to advance a legitimate state

interest, or (2) the regulation denies an owner economically viable use of his land. This second type of taking is subdivided into: (a) a categorical taking, or (b) a taking recognized on the basis of the application of the traditional balancing test. Because plaintiffs concede that the state has a legitimate interest in protecting and preserving wetlands,[FN11] the **539 first type of taking is not at issue. Thus, we limit our analysis to whether plaintiffs were deprived of economically viable use of their land, either by a categorical taking or under the balancing test.

FN11. See *Harkins v. Dep't of Natural Resources*, 206 Mich.App. 317, 324, 520 N.W.2d 653 (1994) ("the WPA unquestionably advances a legitimate state interest").

A. Categorical Taking

When considering only parcel one, the Court of Appeals concluded that the regulation of plaintiffs' *586 property constituted a categorical taking of their land. However, when we expand our consideration of plaintiffs' property to include at least all of parcels one, two, and four, it is clear that there was not a categorical taking of plaintiffs' property.

For a categorical taking to exist, there must be a denial of "all economically beneficial or productive use of land."

Lucas, supra at 1015, 112 S.Ct. at 2893. In *Lucas,* the plaintiff purchased two lots of land approximately three hundred feet from a beach, with plans to build single-family houses on the property. A subsequent revision of South Carolina's Coastal Tidelands & Wetlands Act [FN12] thwarted the plaintiff's planned construction, and prevented him from developing the land in any way. This led the Court to conclude that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019, 112 S.Ct. at 2895 (emphasis in original). The fact that the property owner must be completely deprived of economically beneficial use of his property was emphasized in a footnote responding to Justice Stevens' dissent:

> FN12. S.C. Code, § 48-39-10 *et seq.*

Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post* [505 U.S.] at 1064[, 112 S.Ct. at 2919]. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not

entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic*587 impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. [*Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659.] [*Id.* at 1019, n. 8, 112 S.Ct. at 2895, n. 8.]

[10] Unlike the property in *Lucas,* plaintiffs' land in the present case was not left economically idle. In *Lucas,* the plaintiff was completely prohibited from developing any part of his land. Here, however, plaintiffs were not prohibited from developing the remaining upland on parcel one, as well as almost all of parcels two and four. Indeed, plaintiffs' second permit application clearly contemplated such development. While the commercial value of the land may have been reduced by the restrictions placed on it by the WPA, it was not rendered worthless or economically idle.[FN13]

> FN13. Even if we did limit our analysis to parcel one, the Court of Appeals conclusion that a categorical taking had occurred is not supported by the record. In its first opinion, the trial court stated: "While it is true that *some financial value will remain,* this Court

finds that what little economic value remains is but a small fraction of the economic value the property would have if all of it could be developed." (Emphasis added.) Thus, while the regulations may have diminished the value of plaintiffs' land, this diminution in value would not give rise to a categorical taking. Instead, it should be analyzed under the traditional case-specific inquiry.

B. The Balancing Analysis

[11] As *Lucas* indicates, regulations that do not rise to the level of a categorical taking may still be so burdensome as to rise to the level of a taking. *Id.* at 1019-1020, n. 8, 112 S.Ct. at 2895-96, n. 8. Therefore, plaintiffs must prove a taking on the basis of the balancing analysis. As explained in part II, this requires an "ad hoc, factual inquir[y]" into three factors: (1) the character of the governmental action, (2) the economic effect of the regulation on the claimant, and (3) the ****540** extent to ***588** which the regulation interfered with distinct investment-backed expectations. *Penn Central* at 124, 98 S.Ct. at 2659. While there is no set formula for determining when a taking has occurred under this test, it is at least "clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." *Bevan*, 438 Mich. at 391, 475 N.W.2d 37, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 497, 107 S.Ct. at 1248.

In the present case, the trial court made several findings of fact with regard to the economic effect of the WPA on parcel one. However, it failed to take into consideration the value of the property when it included parcels two and four. We do not know the value of all three parcels combined, either with or without the regulations. It would be imprudent to decide whether there was a taking of plaintiffs' property on the basis of an inadequate record. Therefore, we reverse the decision of the Court of Appeals, and remand the matter to the trial court for further consideration. On remand, the trial court should compare the value removed from the plaintiffs' land, and also calculate what value remains. It then must reevaluate the case under the three-part balancing test.

V

The decision of the Court of Appeals is reversed and the case is remanded to the trial court. On remand, the trial court must determine (1) if parcel three of plaintiffs' property should be included in the denominator parcel, and (2) whether the effect of the regulations on the entire denominator parcel resulted in a taking under the balancing test.

*589 MALLETT, C.J., and BRICKLEY, BOYLE, WEAVER and MARILYN J. KELLY, JJ., concurred with MICHAEL F. CAVANAGH, J.

TAYLOR, J., not participating

Mich.,1998.
K & K Const., Inc. v. Department of Natural Resources
456 Mich. 570, 575 N.W.2d 531, 28 Envtl. L. Rep. 21,156

Briefs and Other Related Documents (Back to top)

- 1997 WL 33760854 (Appellate Brief) Defendant-Appellant's Second Supplemental Authority (Oct. 09, 1997) Original Image of this Document with Appendix (PDF)
- 1997 WL 33760855 (Appellate Brief) Reply Brief on Appeal -- Appellant (Aug. 28, 1997) Original Image of this Document (PDF)
- 1997 WL 33760867 (Appellate Brief) Brief of Amicus Curiae Michigan Peat, A Division of Bay-Houston Towing Co. (Jul. 29, 1997) Original Image of this Document (PDF)
- 1997 WL 33760866 (Appellate Brief) Brief Amicus Curiae of Pacific Legal Foundation in Support of the Position of Plaintiffs-Appellees (Jul. 25, 1997) Original Image of this Document (PDF)

• 1997 WL 33767879 (Appellate Brief) Brief on Appeal ... Appellees (Jul. 18, 1997) Original Image of this Document (PDF)

• 1997 WL 33760865 (Appellate Brief) Brief on Appeal Amicus Curiae Michigan Natural Areas Council (Jul. 15, 1997) Original Image of this Document (PDF)

• 1997 WL 33760864 (Appellate Brief) Brief of Amici Curiae Michigan Audubon Society, Detroit Audubon Society and National Audubon Society in Support of Defendant-Appellant (Jun. 27, 1997) Original Image of this Document (PDF)

• 1997 WL 33760861 (Appellate Brief) Amici Curiae Brief on Appeal of the Michigan United Conservation Clubs and National Wildlife Federation in Support of Defendant-Appellant (Jun. 25, 1997) Original Image of this Document (PDF)

• 1997 WL 33760862 (Appellate Brief) Appearance, Brief on Appeal by Amicus Tip of the Mitt Watershed Council in Support of Appellant State of Michigan and Department of Natural Resources and Proof of Service (Jun. 25, 1997) Original Image of this Document (PDF)

• 1997 WL 33760856 (Appellate Brief) Brief of Amici Curiae Michigan Municipal League, Michigan Townships Association and State Bar of Michigan Public Corporation Law Section (Jun. 24, 1997) Original Image of this Document (PDF)

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• 1997 WL 33760858 (Appellate Brief) Brief on Appeal Amici Curiae Michigan Environmental Council, et al. (Jun. 24, 1997) Original Image of this Document (PDF)
• 1997 WL 33760860 (Appellate Brief) Brief Of Amicus Curiae, American Planning Association (Jun. 24, 1997) Original Image of this Document (PDF)
• 1997 WL 33767878 (Appellate Brief) Brief on Appeal -- Appellant (Jun. 24, 1997) Original Image of this Document (PDF)
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454 Mich. 903, 562 N.W.2d 788 (Table)

Briefs and Other Related Documents

(The decision of the Court is referenced in the North Western Reporter in a table captioned "Supreme Court of Michigan Applications for Leave to Appeal.")

Supreme Court of Michigan
K & K Construction, Inc., J.F.K. Company, Resorts and Company
v.
Michigan Department of Natural Resources
NO. 106712. COA No. 168393.
April 29, 1997

Prior Report: 217 Mich.App. 56, 551 N.W.2d 413.

Disposition: Motions for leave to file briefs *amicus curiae* are **GRANTED**. Leave to appeal **GRANTED**.

The State Bar Real Property Law Section and the State Bar Environmental Law Section and other persons or groups interested in the determination of the question are invited to file briefs amici curiae.

Copr. (C) West 2006 No Claim to orig. U.S. Govt. Works Mich. 1997.

Briefs and Other Related Documents (Back to top)

• 1997 WL 33760854 (Appellate Brief) Defendant-Appellant's Second Supplemental Authority (Oct. 09, 1997) Original Image of this Document with Appendix (PDF)
• 1997 WL 33760855 (Appellate Brief) Reply Brief on Appeal -- Appellant (Aug. 28, 1997) Original Image of this Document (PDF)
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• 1997 WL 33767879 (Appellate Brief) Brief on Appeal ... Appellees (Jul. 18, 1997) Original Image of this Document (PDF)
• 1997 WL 33760862 (Appellate Brief) Appearance, Brief on Appeal by Amicus Tip of the Mitt Watershed Council in Support of Appellant State of Michigan and Department of Natural Resources and Proof of Service (Jun. 25, 1997) Original Image of this Document (PDF)
• 1997 WL 33760856 (Appellate Brief) Brief of Amici Curiae Michigan Municipal League, Michigan Townships Association and State Bar of Michigan Public Corporation Law Section (Jun. 24, 1997) Original Image of this Document (PDF)
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217 Mich.App. 56, 551 N.W.2d 413

Court of Appeals of Michigan.
K & K CONSTRUCTION, INC., J.F.K. Company, and Resorts and Company,
Plaintiffs-Appellees,
v.
DEPARTMENT OF NATURAL RESOURCES,
Defendant-Appellant,
and
Michigan Association of Home Builders,
Amicus Curiae.
Docket No. 168393.
Submitted Dec. 13, 1995, at Lansing.
Decided June 4, 1996, at 9:00 a.m.
Released for Publication July 29, 1996.

Unsuccessful applicants for permit to construct restaurant brought regulatory takings suit against Department of Natural Resources (DNR), who denied the permit. The Court of Claims, William E. Collette, J., entered judgment in favor of applicants, and DNR appealed as of right. The Court of Appeals, Jansen, P.J., held that: (1) permit denial was not based on fundamental principle of state property law; (2) fact that Wetlands Protection Act (WPA) was enacted before quitclaim deed passed title of property to applicants did not preclude compensation for taking; (3) appropriate property to consider was 55 acres designated as parcel, rather than 28 acres declared to be wetlands or entire 82 acres of property; (4) evidence supported finding that parcel, as regulated by permit denial, was essentially

worthless as commercial real estate; (5) DNR's decision to accept implementation of mitigation plan, after lower court had found that there was taking, did not eliminate taking; (6) statute mandating method of computing just compensation was unconstitutional; and (7) damages awarded were not excessive.
Affirmed.

West Headnotes

[1] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Property may only be taken when there exists essential nexus between legitimate state interest and taking; if nexus exists, there must be rough proportionality between manner of taking and actual state interest involved. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[2] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

(Formerly 148k2(1))

Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))

There are two distinct categories of regulatory action that require compensation without case-specific inquiry: regulations that compel property owner to suffer physical invasion of property, and regulations that deny all economically beneficial or productive use of land. U.S.C.A. Const.Amend. 5.

[3] Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))

Regulation that prohibits all economically beneficial use of land cannot be newly legislated or decreed without

compensation, but must inhere in title itself, with restriction that background principles of state property or nuisance law may already place on land ownership. U.S.C.A. Const.Amend. 5.

[4] Eminent Domain 148 ⚿2.27(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases
(Formerly 148k2(1.2))

Generalized invocations of public interest in conservation and development of natural resources of state set forth in state Constitution, and legislature's declarations in Wetland Protection Act (WPA) and Environmental Protection Act were not background principles of nuisance and property law sufficient to prohibit, without just compensation, landowner's use of property to build restaurant. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 4, § 52; M.C.L.A. § § 281.701 et seq., 691.1201 et seq. (Repealed).

[5] Eminent Domain 148 ⚿2.10(3)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other

Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(3) k. Nuisance and Demolition. Most Cited Cases
(Formerly 148k2(1))

For purposes of determining whether constitutional taking has occurred, state must do more than proffer legislature's declaration that uses landowner desires are inconsistent with public interest; rather, state must identify background principles of nuisance and property law that prohibit uses landowner intends in circumstances in which property is found. U.S.C.A. Const.Amend. 5.

[6] Eminent Domain 148 ⚿2.27(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases
(Formerly 148k2(1.2))

Fact that Wetlands Protection Act (WPA) was enacted before quitclaim deed passed title of property to landowners did not preclude landowners from compensation for taking in connection with denial of application for permit to build restaurant on land;

proscribed use interests did not inhere in title itself. U.S.C.A. Const.Amend. 5; M.C.L.A. § 281.701 et seq. (Repealed).

[7] Eminent Domain 148 ⚿2.27(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases
(Formerly 148k2(1.2))

In determining whether there was constitutional taking in denial, pursuant to Wetlands Protection Act (WPA), of application for permit to construct restaurant, specific property affected by permit denial, would be considered to be parcel on which applicants wished to build restaurant, which parcel covered approximately 55 acres of the total property, rather than only the 28 acres declared to be wetlands, or the entire 82 acres of the property; only that parcel was affected by WPA, other parcels were zoned differently, and there was no single owner of all four parcels. U.S.C.A. Const.Amend. 5; M.C.L.A. § 281.701 et seq. (Repealed).

[8] Eminent Domain 148 ⚿300

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation
148k294 Evidence
148k300 k. Weight and Sufficiency. Most Cited Cases

Evidence supported finding that parcel, as regulated by denial, pursuant to Wetlands Protection Act (WPA), of permit to construct restaurant, was essentially worthless as commercial real estate for purposes of determining whether there had been constitutional taking; the 28 acres of wetlands were irregularly shaped within the 55-acre parcel, such that it was not possible to simply build on remaining 27 acres, and development of edges of area of parcel was apparently not economically feasible due to land needs for restaurant, including parking lots. U.S.C.A. Const.Amend. 5; M.C.L.A. § 281.701 et seq. (Repealed).

[9] Eminent Domain 148 ⚿2.27(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases
(Formerly 148k2(1.2))

Decision of Department of Natural Resources (DNR) to accept implementation of mitigation plan for development

of parcel containing wetlands property, which decision was not made until after court found that there was unconstitutional taking effected by denial, pursuant to Wetland Protection Act (WPA), of permit to construct restaurant, did not eliminate existence of taking, so as to preclude award of compensation; 28 acres of property which was either wetlands property or was to become wetlands property pursuant to mitigation plan were permanently taken, and 27 remaining acres of parcel were temporarily taken. U.S.C.A. Const.Amend. 5; M.C.L.A. § 281.701 et seq. (Repealed).

[10] Eminent Domain 148 ⚿123

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k123 k. Sufficiency of Statutory Provisions as to Amount. Most Cited Cases

Statute mandating method of computing just compensation for taking, limiting recovery to twice state equalized value of property taken, was unconstitutional, as it violated just compensation clause of Fifth Amendment and parallel provision of State Constitution. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2; M.C.L.A. § 281.721(4) (Repealed).

[11] Eminent Domain 148 ⚿122

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k122 k. Necessity of Just or Full Compensation or Indemnity. Most Cited Cases

"Just compensation," for purposes of state and federal constitutional provisions stating that private property cannot be taken for public use without just compensation, means full monetary equivalent of property taken; "just compensation" is that amount that places property owner in condition as good as owner would have been in had taking not occurred. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[12] Constitutional Law 92 ⚿55

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k51 Encroachment on Judiciary
92k55 k. Remedies and Procedure. Most Cited Cases

Eminent Domain 148 ⚿123

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k123 k. Sufficiency of Statutory Provisions as to Amount. Most Cited Cases

Determination of proper measure of compensation for taking is solely judicial question, and legislature therefore may not restrict measure of just compensation in takings case, and statutes setting forth compensation rate for taking are unconstitutional. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[13] Eminent Domain 148 ⚿303

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k301 Damages and Amount of Recovery
148k303 k. Compensation for Property Taken or for Injury. Most Cited Cases

Eminent Domain 148 ⚿305

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k301 Damages and Amount of Recovery
148k305 k. Inadequate or Excessive Damages. Most Cited Cases

Damages of $3,245,256, plus interest of $1,574,522.60 for property taken by denial of permit to construct restaurant, as well as $549,400 for temporary use of property, were not excessive. U.S.C.A. Const.Amend. 5.

[14] Eminent Domain 148 ⚿122

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k122 k. Necessity of Just or Full Compensation or Indemnity. Most Cited Cases

In takings case, public must not be enriched at property owners' expense, but neither should property owners be enriched at public's expense. U.S.C.A. Const.Amend. 5.

[15] Eminent Domain 148 ⚿122

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k122 k. Necessity of Just or Full Compensation or Indemnity. Most Cited Cases

There is no formula or artificial measure of damages applicable to all condemnation cases; amount of damages to be recovered by property owner is generally left to discretion of trier of fact after consideration of evidence presented. U.S.C.A. Const.Amend. 5.

[16] Eminent Domain 148 ⚿126(1)

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k125 Nature and Extent of Right Taken
148k126 In General
148k126(1) k. In General. Most Cited Cases

Eminent Domain 148 ⚿143

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k143 k. Temporary Use of Property.
Most Cited Cases

In avoiding windfalls to property owners in eminent domain cases, nature of taking must be considered; where there is temporary taking, just compensation awarded must reflect its temporary nature. U.S.C.A. Const.Amend. 5.

[17] Eminent Domain 148 ⚿143

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k143 k. Temporary Use of Property.
Most Cited Cases

Courts should engage in flexible approach in determining compensation for temporary taking; some factors to

consider include: rental return, option price, interest on lost profit, before and after valuation, and benefit to government. U.S.C.A. Const.Amend. 5.

**415*58 Robert L. Bunting, Oxford, and Karen Russell, Mt. Clemens, for the plaintiffs.
Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, A. Michael Leffler and Kevin T. Smith, Assistant Attorneys General, for the defendant.
Dickinson, Wright, Moon, Van Dusen & Freeman, Lansing (by Gregory L. McClelland, David E. Pierson, and Jeffery V. Stuckey), for Amicus Curiae Michigan Association of Home Builders.

Before JANSEN, P.J., and TAYLOR and J.P. NOECKER,[FN*] JJ.

FN* James P. Noecker, 45th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

JANSEN, Presiding Judge.
This is a regulatory takings case. Defendant Department of Natural Resources appeals as of right from a September 8, 1993, judgment of the Court of Claims in plaintiffs' favor. The Court of Claims determined that a taking had occurred as a result of defendant's decision to deny plaintiffs' application for a permit to build a restaurant on a

parcel of land on the basis that the land was protected wetlands. The Court of Claims awarded $3,245,256 for the property taken, plus interest of $1,574,522.60, and $459,400 for a temporary taking of part of the land. We affirm.

I

Plaintiffs own approximately eighty-two acres of property in Waterford Township in Oakland County. The property was acquired in 1976 by Joseph and *59 Elaine Kosik. J.F.K. Company is a Michigan limited partnership consisting of the five children of the Kosiks. J.F.K. Company is a part owner of the property through a quit-claim deed executed by the Kosiks. K & K Construction is a Michigan corporation, of which Joseph Kosik and one of his sons are the sole shareholders. K & K Construction has no ownership interest in the property involved in this case. Resorts and Company is a Michigan copartnership and is a part owner of the eighty-two-acre property.

The Court of Claims concluded that the property consisted of four distinct parcels. The parcel at issue was parcel 1, on which J.F.K. Company wished to build a C.J. Barrymore's Restaurant. Parcel 1 covered approximately fifty-five acres of the entire property. On May 28, 1988, plaintiffs applied for a permit to develop the property. On November 7, 1988, defendant denied the permit on the

basis of a determination that approximately twenty-eight acres of the property was protected wetlands under the Wetland Protection Act (WPA), M.C.L. § 281.701 *et seq.*; M.S.A. § 18.595(51) *et seq.*

Plaintiffs then filed the present action on December 29, 1988, in the Court of Claims. Plaintiffs initially sought a declaratory ruling that the area is not wetlands and also sought injunctive relief against defendant's enforcement**416** of the WPA and damages under the WPA. Plaintiff's sought a determination that defendant's actions constituted a taking of their property for which they were entitled to just compensation. On May 1, 1990, plaintiffs submitted a second application for a permit to fill approximately 3.17 acres of wetlands and to convert 5.36 acres of upland to wetlands. This plan was known as the "Goga Plan" and involved *60 a total of over seventy-two acres of property on parcels 1, 2, and 4. This second application was also denied on July 26, 1990.

Trial was held before the Court of Claims, sitting as the factfinder, on December 17, 1991. The only issue before the court was whether there was a taking because of the permit denial such that plaintiffs were entitled to just compensation. On November 2, 1992, the Court of Claims issued its opinion and order determining that a taking occurred because the wetlands restrictions rendered the property essentially worthless as commercial real estate,

and that plaintiffs were therefore entitled to just compensation. After various postjudgment motions and consideration of the Goga Plan, the Court of Claims awarded a total of $5,279,178 in favor of plaintiffs.

II

Plaintiffs contend that defendant's actions of denying the permit to fill the wetlands constitute an unconstitutional taking of property without just compensation. The Fifth Amendment of the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation." Similarly, the Michigan Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Const.1963, Art. 10, § 2. The Takings Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. *Dolan v. City of Tigard*, 512 U.S. 374, ---- - ----, 114 S.Ct. 2309, 2315-2316, 129 L.Ed.2d 304, 315 (1994); *Peterman v. Dep't of Natural Resources*, 446 Mich. 177, 184, n. 10, 521 N.W.2d 499 (1994).

***61** A

[1] Property may be taken only when an essential nexus exists between a legitimate state interest and the taking. If the nexus exists, then there must be a "rough

proportionality" between the manner of the taking and the actual state interest involved. *Dolan, supra,* p. 2309, 114 S.Ct. p. 2317, 129 L.Ed.2d p. 317; *Peterman, supra,* p. 201, 521 N.W.2d 499. The parties do not dispute that the state has a legitimate interest in preserving and protecting wetlands. See *Attorney General ex rel. Dep't of Natural Resources v. Huron Co. Rd. Comm'n,* 212 Mich.App. 510, 516, 538 N.W.2d 68 (1995) ("[t]he primary purpose of the WPA is to ensure that wetland habitats are preserved and protected"). Further, there is no dispute that an essential nexus exists between the legitimate state interest in this case (the preservation and protection of wetlands) and the taking (the land-use regulation). See *Harkins v. Dep't of Natural Resources,* 206 Mich.App. 317, 324, 520 N.W.2d 653 (1994) ("the WPA unquestionably advances a legitimate state interest"). The crucial issue we face is whether there is a taking within the meaning of the Fifth Amendment to require just compensation.

The United States Supreme Court has explained that the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests *or* denies an owner economically viable use of the owner's land. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992). In land-use regulation cases, it has been recognized that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.

Id., p. 1014, 112 S.Ct. p. 2893; *62*Volkema v. Dep't of Natural Resources*, 214 Mich.App. 66, 69, 542 N.W.2d 282 (1995). The Supreme Court has not set a formula regarding what constitutes going "too far," but has engaged in ad hoc factual inquiries. *Lucas, supra*, p. 1015, 112 S.Ct. p. 2893.

[2] However, there are two distinct categories of regulatory action that require compensation without case-specific inquiry. The first category encompasses regulations that **417 compel the property owner to suffer a physical invasion of the property. The second category is where regulation denies all economically beneficial or productive use of the land. *Id.*, pp. 1015-1019, 112 S.Ct. pp. 2893-2895. The Court of Claims concluded that application of the WPA denied plaintiffs all economically beneficial or productive use of the land.

[3] The United States Supreme Court has noted that "affirmatively supporting a compensation requirement ... [are] regulations that leave the owner of land without economically beneficial or productive options for its use-typically ... by requiring land to be left substantially in its natural state." *Id.*, p. 1018, 112 S.Ct. pp. 2894-2895. In *Lucas*, the Court held that where the state seeks to sustain regulation that deprives property of all economically beneficial use, the state may resist compensation only if an inquiry into the nature of the owner's property shows that

the interests behind the proscribed use were not part of the title to begin with. *Id.*, p. 1027, 112 S.Ct. p. 2899. Thus, a regulation that prohibits all economically beneficial use of land cannot be newly legislated or decreed without compensation, but must inhere in the owner's title itself, with the restriction that background principles of state property or nuisance law may already place on land ownership. *Id.*, pp. 1028-1029, 112 S.Ct. p. 2900.

***63** [4][5] In the case before us, we reject defendant's claim that the permit denial was based on a fundamental principle of Michigan property law. Defendant claims that such a principle is found in our state constitution:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const.1963, Art. 4, § 52.]

In *Lucas,* the Supreme Court made clear that the state must do more than proffer the legislature's declaration that the uses the landowner desires are inconsistent with the public interest. Rather, the state must identify background principles of nuisance and property law that prohibit the uses the landowner intends in the circumstances in which

the property is found. *Lucas, supra,* pp. 1030-1031, 112 S.Ct. p. 2901.

The constitutional provision quoted above is not a principle of nuisance and property law. The decision to build a restaurant on land, or a request to fill in wetlands, does not constitute a nuisance that the government may abate. See *id.,* p. 1029, 112 S.Ct. p. 2900; *Miller Bros v. Dep't of Natural Resources,* 203 Mich.App. 674, 682, 513 N.W.2d 217 (1994). We are not aware of any common-law principle preventing the building of a restaurant on plaintiffs' land. Thus, the generalized invocation of public interests in the state constitution, and the Legislature's declarations in the WPA and the Michigan Environmental Protection Act, M.C.L. § 691.1201 *et seq.;* M.S.A. § 14.528(201) *et seq.,* do not constitute background principles of nuisance and property law sufficient ***64** to prohibit the use of plaintiffs' land without just compensation.

B

[6] Defendant also contends that because the regulation, the WPA, was enacted before the quit-claim deed passed title to J.F.K. Company, plaintiffs are precluded from compensation. We do not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due. See *Nollan v. California Coastal Comm,* 483 U.S. 825, 833, n.

2, 107 S.Ct. 3141, 3147 n. 2, 97 L.Ed.2d 677 (1987) (The landowners' rights were not altered because they acquired the land well after the commission had begun to implement its policy. As long as the commission could not have deprived the prior owners of the easement without compensation, the prior owners must be understood to have transferred their full property rights in conveying the lot.)

In this case, the property was acquired by Joseph and Elaine Kosik in 1976. They transferred the property through a quit-claim deed to J.F.K. Company in 1986. The WPA took effect in 1980. The passage of the WPA cannot be understood as depriving ****418** J.F.K. Company of just compensation merely because the WPA was in effect when the quit-claim deed was executed. Because we have concluded that the interests served by the proscribed use in this case do not inhere in the title itself, the timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation. *Lucas, supra,* pp. 1027-1031, 112 S.Ct. pp. 2899-2901.

***65** C

[7] Next, in order to determine if plaintiffs were deprived of all economically beneficial or productive use of their land, we must decide what specific property was affected by the permit denial. It is defendant's contention that the Court of Claims should have considered all eighty-two

acres of the property in determining whether a taking occurred in this case. At trial, plaintiffs argued that the Court of Claims should consider only the twenty-eight acres that were declared to be wetlands. The Court of Claims rejected both contentions and found that it would consider the fifty-five acres designated as parcel 1. On appeal, plaintiffs urge us to affirm the Court of Claims' ruling. We find that the Court of Claims' factual finding in this regard is not clearly erroneous. M.C.R. § 2.613(C).

A proper resolution of this issue is not subject to any clear rule. In *Bevan v. Brandon Twp.*, 438 Mich. 385, 393, 475 N.W.2d 37 (1991), our Supreme Court held that a person's property generally should be considered as a whole when deciding whether a regulatory taking has occurred. In *Bevan,* however, the property in question consisted of two contiguous parcels under the same ownership and subject to a single zoning scheme. In the case before us, parcel 1 is zoned for commercial use, while parcels 2, 3, and 4 are zoned for residential use. Further, there is no single owner of all four parcels. Parcel 1 is owned in part by J.F.K. Company, and parcels 2 and 4 are owned solely by J.F.K. Company. Parcel 3 is owned by both J.F.K. Company and Resorts and Company. Finally, the regulation in this case does not affect all four parcels. Only parcel 1 is affected by the WPA.

*66 More recently, this Court relied on *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (CA Fed, 1994), in analyzing a similar issue. See *Volkema, supra*, pp. 71-72, 542 N.W.2d 282. In *Loveladies Harbor*, the plaintiffs originally owned 250 acres of land that had been acquired in 1958. By 1972, 199 acres of the land had been developed, before the enactment of § 404 of the Clean Water Act. 33 U.S.C. § 1344. The plaintiffs sought a fill permit to develop the remaining fifty-one acres for residential use. The permit was initially denied, but the state eventually entered into an agreement whereby the plaintiffs could develop 12.5 acres of the land. However, the plaintiffs also had to seek permit approval from the Army Corps of Engineers. The corps ultimately denied the permit.

The court in *Loveladies Harbor* had to determine the "denominator parcel" in order to determine whether a taking had occurred. The court rejected any bright-line rule and instead adopted a flexible approach to account for factual nuances of each individual case. *Loveladies Harbor, supra*, p. 1181. This approach was also recently adopted by this Court in *Volkema, supra*, p. 73, 542 N.W.2d 282. The court in *Loveladies Harbor*, found that the 199 acres that had been developed before enactment of § 404 of the Clean Water Act should not be considered as part of the denominator because no effort had been made by the state to regulate that land. With regard to the

remaining fifty-one acres, the court found that the 38.5 acres had been essentially given to the state in exchange for the permit to develop the remaining 12.5 acres. The court refused to include the 38.5 acres as part of the denominator because that land had no value to the plaintiffs. Thus, the court concluded that only 12.5 ***67** acres would be considered as the denominator, and that because the value was de minimis, the owner was deprived of all economically feasible use of the property and was entitled to just compensation. *Loveladies Harbor, supra,* pp. 1181-1182.

In *Volkema,* this Court employed the same "factual nuances" analysis, but reached a different conclusion. The plaintiffs in *Volkema* bought forty-five acres of commercial property****419** in 1963 and a contiguous five-acre parcel in 1979. The plaintiffs developed the property and were left with 24.6 acres at the time of the litigation. The plaintiffs sought a permit to fill 4.3 acres of wetlands, but that permit was denied. The plaintiffs sought compensation for the six acres they claimed were rendered useless because of the denial of the fill permit.

This Court held that it would not include the entire forty-five acres in the denominator because approximately half of that land was developed before enactment of the WPA. However, this Court held that it would consider the remaining 24.6 acres as the denominator, rather than the six

acres as urged by the plaintiffs. In *Volkema,* the entire 24.6 acres was of high value to the plaintiffs, and the land, when viewed as a whole, continued to have substantial value because it could still be developed for commercial purposes. Thus, this Court concluded that the plaintiffs had suffered no taking where most of the land could be developed for commercial purposes. *Volkema, supra,* p. 74, 542 N.W.2d 282.

In the present case, the Court of Claims properly considered only the fifty-five acres of parcel 1. Parcels 2, 3, and 4 are zoned for residential purposes, while parcel 1 is zoned for commercial uses. Parcel 3 ***68** was developed before plaintiffs first applied for the permit. Parcels 2 and 4 are not developed. Because of the differences in the zoning of the four parcels and the differences in their ownership, we conclude that the Court of Claims' factual finding that the fifty-five acres should be considered as the denominator is not clearly erroneous.

D

[8] Defendant next contends, however, that even in light of the regulation, there was no taking because the property retained significant value. The Court of Claims found that parcel 1, as affected by the permit denial, was essentially worthless as commercial real estate. This factual finding is not clearly erroneous, given the evidence presented at trial.

The Court of Claims credited the testimony of plaintiffs' experts, who concluded that the property was essentially worthless. The Court of Claims discounted the conclusion of defendant's expert that the edges of the parcel could still be developed, because that conclusion was refuted by plaintiffs' experts. We note that the twenty-eight acres of wetlands is irregularly shaped within the fifty-five-acre parcel. Thus, it is not possible to simply leave the wetlands area undeveloped and build on the remaining twenty-seven acres. If the twenty-eight acres of wetlands was not developed, the only area that could be feasibly developed would be the edges of the area of parcel 1. This was apparently not economically feasible because of the land needs for a restaurant, including parking lots or any other commercially viable use. Thus, this case is unlike *Volkema* because there the plaintiffs could still use the remaining eighteen acres of over twenty-four ***69** acres of property. Here, the plaintiffs could not develop the remaining twenty-seven acres because of the configuration of the wetlands within the parcel.

Accordingly, the Court of Claims did not err in concluding that the regulation in this case denied the owners all economically beneficial or productive use of the land. Thus, a taking occurred within the meaning of the Fifth Amendment and plaintiffs were entitled to just

compensation for the fifty-five acres of land affected by the regulation.

III

[9] Defendant next argues that the Court of Claims erred in rejecting its option to cure the taking by permitting implementation of the Goga Plan.

Plaintiffs first submitted an application on May 28, 1988, regarding development of parcel 1. On November 7, 1988, defendant denied a permit to develop the property because twenty-eight acres of the parcel were determined to be protected wetlands. Plaintiffs then filed their complaint on December 29, 1988. Thereafter, William Goga, a civil engineer retained by plaintiffs, developed a mitigation plan. He proposed that some wetlands be filled in parcel 1, but that wetlands could be created in the parcel from nonwetlands area. This plan was submitted **420 to defendant in April 1990. Defendant rejected this plan and denied the subsequent permit application based on Goga's plan in July 1990.

Trial in this matter was held on December 17, 1991. On November 5, 1992, the Court of Claims issued an opinion and order in which it found that a taking had occurred because plaintiffs were denied all economically beneficial or productive use of the land because *70 of the permit denial. It was not until after this determination that

defendant agreed to accept the Goga Plan. The Court of Claims issued a second opinion and order, dated May 4, 1993, which mainly dealt with various compensation issues. The Court of Claims specifically found that defendant was entitled to accept the Goga Plan pursuant to M.C.L. § 281.721(3)(c); M.S.A. § 18.595(71)(3)(c). This provision specifically allowed defendant to modify its action so as to minimize the detrimental effect to the property's value after the court determined that defendant's action constituted a taking. The Court of Claims found no objection to this approach. The Court of Claims then stated that those portions of the property defined as being part of the Goga Plan could be exempted from the taking, while those portions that were to be transformed into wetlands would be considered to be condemned.

In considering what constituted just compensation, the Court of Claims ruled that plaintiffs would be awarded interest and fair market value of the portion of land actually condemned. The court specifically did not include that portion of the land that could still be commercially developed under the Goga Plan. Thus, defendant's characterization of the Court of Claims' action as being a rejection of defendant's decision to accept the Goga Plan is not supported by the record.

Further, we cannot agree with defendant's contention that its decision to offer a permit for the Goga Plan eliminates

the taking. The Court of Claims found, and we agree, that there was an unconstitutional taking in this case due to the regulation of the wetlands area. It was not until after a finding by the *71 Court of Claims that defendant decided to accept implementation of the Goga Plan. However, this action does not eliminate a taking. As the Court of Claims correctly determined, twenty-seven acres of the parcel were temporarily taken and twenty-eight acres were permanently taken.

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles Co,* 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987), the Supreme Court held that where the government's activities have created a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Such "temporary takings" are also entitled to just compensation.

Therefore, we find that the Court of Claims did not err in awarding compensation. The court properly found that there was a temporary taking concerning part of the land and a permanent taking concerning the remaining portion of the land. Thus, the court's order awarding compensation complied with M.C.L. § 281.721(4); M.S.A. § 18.595(71)(4) in that it found a temporary taking concerning part of the land that could be developed under the Goga Plan.

IV

[10] Next, defendant contends that the trial court erred in finding M.C.L. § 281.721(4); M.S.A. § 18.595(71)(4) unconstitutional in that it violated the Just Compensation Clauses of the Fifth Amendment and Const. 1963, Art. 10, § 2.

[11] The Court of Claims did not err in finding that § 21(4) is unconstitutional because it limits plaintiffs' recovery to twice the state equalized value of the *72 property taken. Both the federal and state constitutions provide that private property cannot be taken for public use without just compensation. Just compensation means the full monetary equivalent of the property taken. *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, 473, 93 S.Ct. 791, 794, 35 L.Ed.2d 1 (1973). Just compensation is that amount that places a property owner in a condition as good as the owner would have been had the taking not occurred. *Id.;* **421*Oakland Hills Development Corp. v. Lueders Drainage District,* 212 Mich.App. 284, 292-293, 537 N.W.2d 258 (1995).

[12] The determination of the measure of just compensation for a taking is a judicial, not a legislative, question. *United States v. Sioux Nation of Indians,* 448 U.S. 371, 417, n. 30, 100 S.Ct. 2716, 2741, n. 30, 65 L.Ed.2d 844 (1980), citing *Monongahela Navigation Co. v. United States,* 148 U.S.

312, 327, 13 S.Ct. 622, 626-627, 37 L.Ed. 463 (1893). Because the determination of the proper measure of compensation for a taking is solely a judicial question, the Legislature may not restrict the measure of just compensation in a takings case. *Baltimore & O.R. Co. v. United States,* 298 U.S. 349, 368, 56 S.Ct. 797, 807, 80 L.Ed. 1209 (1936). Thus, statutes that set forth the compensation rate for a taking, such as M.C.L. § 281.721(4); M.S.A. § 18.595(71)(4), are unconstitutional. See *Baltimore & O.R. Co., supra; Monongahela, supra.*

Because M.C.L. § 281.721(4); M.S.A. § 18.595(71)(4) mandates the method of computing just compensation for a taking, the Court of Claims correctly held that it is unconstitutional.

*73 V

[13] Last, defendant argues that the Court of Claims awarded excessive damages for the taking. We disagree.

[14][15] The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *Miller Bros, supra,* p. 685, 513 N.W.2d 217. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense. *Id.* There is no formula or artificial measure of

dama[illegible] applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented. *Poirier v. Grand Blanc Twp. (After Remand)*, 192 Mich.App. 539, 543, 481 N.W.2d 762 (1992).

[16][17] In avoiding a windfall to the property owner, the nature of the taking must be considered. Where there is a temporary taking, the just compensation awarded must reflect its temporary nature. *Miller Bros, supra*, p. 687, 513 N.W.2d 217. This Court has recognized that money damages are recoverable for a temporary, unconstitutional taking. Courts should engage in a flexible approach in determining compensation for a temporary taking. Some factors to consider are: rental return, option price, interest on lost profit, before and after valuation, and benefit to the government. *Poirier, supra*, pp. 544-545, 481 N.W.2d 762.

The Court of Claims awarded $3,245,256 and interest of $1,574,522.60 for the property taken. The Court of Claims also awarded $459,400 for the temporary taking of the property. The court's award of damages is based on the evidence presented and does not *74 appear to be an abuse of discretion. In this case, because of the difficulty in determining the fair market value of the land with the use restrictions placed on it, the court appears to have engaged in a flexible approach in computing damages. Defendant

has not shown that the Court of Claims' computation of damages was erroneous or excessive.

Affirmed.

Mich.App.,1996.
K & K Const., Inc. v. Department of Natural Resources
217 Mich.App. 56, 551 N.W.2d 413

END OF DOCUMENT

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

K & K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan Corporation,
Plaintiffs,

vs **Case No.: 88-12120-CM**
HON. WILLIAM COLLETTE

THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES and STATE OF MICHIGAN,
Defendants.

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FINAL JUDGMENT AND AWARD OF DAMAGES TO PLAINTIFFS AGAINST DEFENDANTS DNR AND STATE OF MICHIGAN AND AWARDING COSTS AND ATTORNEY FEES

At a session of said Court held in the City of Lansing, said County and State on _____

PRESENT: HON. _____
WILLIAM COLLETTE

The Court being duly advised in the premises after trial on the merits of the above entitled cause, submission of briefs, responsive briefs and reply briefs together with exhibits and stipulations and being persuaded thereby;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs are awarded judgment in that their property interest have been condemned by the. application of the Wetlands Preservation Act and there has been both a complete taking and interim taking entitling Plaintiffs to just compensation accordingly.

IT IS FURTHER ORDERED AND ADJUDGED that the statutory limit on just compensation payable to owners of property condemned is hereby declared unconstitutional and held for naught as it is solely the province of the Court to determine just compensation under the United States and Michigan Constitutions.

IT IS FURTHER ORDERED AND ADJUDGED that the Court recognizes from the pleadings, evidence and arguments made in this case together with the various stipulations entered into between the parties that good faith efforts were made to resolve portions of the above entitled case which resulted in a plan prepared that allowed for the limited commercial development of some of the perimeter of Plaintiffs' property which plan is known as the "Goga Plan". Defendants are now conceding to Plaintiffs the right to develop and/or sell that limited portion of the property which reduces the award to the Plaintiffs as not all the property would be condemned while at the same time fulfilling the intent of the Wetland Protection Act to minimize the impact on future growth on a valuable resource. Plaintiffs shall have the right to develop and/or sell, the Goga Plan property and a permit shall issue within 30 days, therefore consistent with the Goga Plan and this Court retains exclusive jurisdiction over any issues arising therefrom.

IT IS HEREBY ORDERED AND ADJUDGED that the fair market value under a taking analysis awards Plaintiffs $5,941,181.00 for the entire parcel consisting of 52.67 acres which total acreage and damage calculation is agreed upon by the parties. This entire tract and award is reduced by the amount of acreage in the Goga Plan agreed upon the by parties as 23.9 acres leaving a balance of 28.77 acres as the total acreage which has been condemned by a

takings by the Defendants, said calculation agreed upon by the parties after reference to the surveys of the property involved.

THEREFORE, IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs award shall be reduced accordingly and they shall recover the percentage of the $5,941,181.00 divided by the total acreage of 52.67 acres resulting in a net award of $3,245,256.00 of the taken 28.77 acres of property by condemnation, plus $1,574,522.60 in interest through June 30, 1993.

IT IS FURTHER ORDERED AND ADJUDGED that the Court finds that Plaintiffs loss the use of the "Goga" property for several years back to November 12, 1988 which loss is determined to be an interim taking with a damage award based on the testimony and evidence as $106,635.00 annually when adjusted to the Goga property alone, a figure computed and agreed upon as the proper computation by the parties. Therefore, Plaintiffs are awarded an interim taking damage award of $459,400.00 including interest through June 30, 1993, on the interim taking of the Goga Plan property for a total award of damages and interest through June 30, 1993 of $5,279,178.00.

IT IS FURTHER ORDERED AND ADJUDGED that in light on this Court's determination that Defendants

took and must compensate Plaintiffs for the taking of 28.77 acres, title to the 28.77 acres is vested in Defendants, subject to Plaintiffs' right to use 5.359 acres of the .18.77 acre parcel for wetland mitigation as set forth in the Goga Plan presented to the Court.

IT IS HEREBY ORDERED AND ADJUDGED that the interior 28.77 acre property as described in Trial Exhibit A and A-2 is conveyed pursuant to order of this Court and Circuit Court Deed to Defendants as of November 12, 1988 subject to the right of mitigation vested in Plaintiffs pursuant to the Goga Plan. This judgment is deemed recordable in the chain of title and Plaintiffs shall execute a Quit Claim Deed accordingly conveying the interior 28.77 acres only with the right of mitigation under the Goga Plan.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs are awarded their costs in the amount of $10,075. which is awarded to Plaintiffs after review by opposing counsel in addition to the award on damages against Defendants, State of Michigan and DNR.

IT IS FURTHER ORDERED AND ADJUDGED that the Court is cognizant that Plaintiffs retained their attorney under a one-third contingency agreement should the matter proceed to trial; the Court declines to award a one-third attorney fee in the above entitled case given the

status of current case law and limits Plaintiffs award for attorney fees to reasonable attorney fees under the Mediation Rule. The Court finds a reasonable fee given the complexity of the case, diligence of counsel and complexity of issues involved as the hourly rate of $185.00 an hour for 380 hours which amount is based upon prior review by opposing counsel since the date of the acceptance\rejection period of mediation for a total award of $70,300.00 in. attorney fees sustained in this cause pursuant to the mediation rule and awards the same as part of this judgment together with judgment interest on the entire award excluding fees and costs running from July 1, 1993 onward.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants' Motion for Entry of Judgment, dated December 4, 1992, is denied.

IT IS FURTHER ORDERED AND ADJUDGED that while both counsel have cooperated in referencing detailed exhibits and surveys to accurately compute the acreage and damages awarded by this Court, the Attorney General preserves all of its appellate rights on the result reached by this Court.

/s/ William E. Collette
HONORABLE WILLIAM COLLETTE

APPROVED AS TO FORM
WITH NOTICE OF ENTRY WAIVED:

/S/ Robert L. Bunting
ROBERT L. BUNTING (P-24212)
Attorney for Plaintiffs

/S/ Kevin T. Smith
KEVIN T. SMITH (P-32825)
Assistant Attorney General
Attorney for Defendants

STATE OF MICHIGAN IN THE COURT OF CLAIMS

K & K CONSTROCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan corporation,
Plaintiffs,

File No. 88-12120-CM
Hon. William E. Collette

v

OPINION AND ORDER

THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES and STATE OF MICHIGAN,
Defendants.

Previously, this Court determined that the property of Plaintiffs has been condemned by the actions of the Defendants in declaring a substantial portion of it to be a wetland protected under the Goemaere-Anderson Wetland Protection Act, MCLA281.701, et seq. This Court ruled that damages suffered by Plaintiffs cannot exceed twice the state equalized evaluation (SEV) pursuant to MCLA 281.721(4).

This Court also allowed the Defendants the option of issuing a waiver of all or a portion of the designation in lieu of compensation, pursuant to MCLA 281.721(3) (C).

The following questions are presented for consideration by the Court in this supplementary opinion.

1. Is MCLA 281.721(4) unconstitutional in that it limits compensation for a taking to twice the SEV, rather than the fair market value of the property?

2. May the Defendants issue a "waiver" for a portion of the property and thus minimize the taking and resultant expense?

3. If the Court permits the partial waiver, what amount, if any, will fairly compensate Plaintiffs for that portion of the property actually taken?

4. Must Defendants compensate Plaintiffs for the time the property now "waived" was "taken" under the original designation?

5. Are plaintiffs entitled to mediation fees?

6. Are Plaintiffs entitled to interest?

I.

IS MCLA 281.721(4) UNCONSTITUTIONAL IN THAT IT DOES NOT PROVIDE FOR COMPENSATION EQUAL TO THE TRUE VALUE OF THE PROPERTY TAKEN?

MCLA 281.721(4) provides in part that:

> . . . the value of the property may not exceed that share which the area in dispute occupies in the total parcel of land, of the state equalized evaluation of the total parcel, multiplied by 2, as determined by an inspection of the most recent assessment roll of the township or city in which the parcel is located.

Pursuant to this section, the Court limited the recovery of the Plaintiffs to twice the SEV of the property. This amount is substantially less than the fair market value of the parcel which has been described as being one of the last available large parcels of commercial real estate on M-59 in Oakland County.

A.

Article V of the Bill of Rights provides that:

> No person shall be . . . deprived of life, liberty, or property without due process of

> law; nor shall private property be taken for public use, without just compensation.

The Constitution of the state of Michigan also indicates in Article x, Section 2, that:

> Private property shall not be taken for public use without just compensation therefore being first made or secured . . .

The intent of the Bill of Rights and the Constitution is unmistakable.

> Just compensation . . . must put the party injured in as good position as he would have been if the injury had not occurred. It should neither enrich the individual at the expense of the public nor the public at the expense of the individual. State Highway Commissioner v Eilender, 362 Mich 697, 699 (1961) citing In Re John C. Lodge Highway, 340 Mich 254 (1954) •

This concept has been rigidly followed in the law of the State of Michigan and is embroidered into the Michigan Standard Jury Instructions in CJI2d 90.05.

In order to adequately comply with these mandates, we must use the actual fair market value of the property as the true measure of its value. Since only that measure can place the owner in as good a position as he would have

been had there been no taking. Consumer Power Co v. Allegan State Bank, 20 Mich App 720 (1969),

The government that, through its legislative power, decides to take a parcel of property cannot, through that same power, determine the fair compensation for its taking. See Baltimore and O.R. Co v United States, 298 US 349 (1935); Mononqahela Navigation Co v United States, 148 US 310 (1892). Only a court of law standing separate and apart from the executive and legislative branches of government should and does have the power constitutionally to fix "just compensation" for a taking. Consumers Power Co v. Allegan State Bank, supra.

In drafting the Wetland Protection Act, the legislature was cognizant that many competing interests were at stake. This is evident from the attempts made to address the concerns of both the owners of potentially-affected property and the necessity of protecting our environment. Previously, this Court has noted a concern with the failure of the government to properly inventory potential wetland areas as required by MCLA 281.719. This section, if properly implemented, requires the Department of Natural Resources (DNR) to inventory on a county by county basis all of the potentially affected lands in the state. Under MCLA 281.720, each property owner with affected property would be notified of the possible change in the status of their property and the possible

change in status would be printed on the tax bill. Obviously, this action would substantially affect the SEV of the subject property and an owner could demand a reduction in the taxes paid on the property.

Property owners in the position of the Plaintiffs in this case are faced with a dilemma. If they wish to institute a suit to have the property condemned, they cannot ask to have their taxes reduced because of the classification of the property as a wetland. They are required under the Act to continue to pay excessive taxes (in this case over $24,000 per year) while attempting to recover something for their property. To place any aggrieved party in this position is intolerable.

It is therefore the opinion of this Court that the limit on "just compensation" payable to the owners of property condemned under MCLA 281.721(4) is unconstitutional.

II.

CAN THE STATE MODIFY THE TAKING IN THIS CASE TO ALLOW DEVELOLMENT OF SOME OF THE PROPERTY AND THUS LIMIT THE AMOUNT Of COMPENSATION DUE THE PLAINTIFFS?

During the lengthy history of this case, the parties in good faith efforts to resolve the dispute had a plan prepared

that allowed for the development of some of the perimeter of the property. This plan (known as the "Gaga plan") would have required that some areas of the property delineated as wetlands be destroyed. However, other areas would be added to the wetland areas to offset this action.

Under MCLA 281.721(3) (C), the Defendants are now prepared to accept the Goga plan. This would allow use by the Plaintiffs of some property for limited commercial development. Of course there would need to be a reduction in the award to the Plaintiffs, as not all of the property would be condemned. This Court finds no objection to this approach and applauds the Defendants for this action. One must remember that the intent of the Wetland Protection Act is to minimize the impact of future growth on a valuable resource. The obvious conflict between these two highly necessary endeavors will continue unless we use a rational approach to resolving the conflicts. The testimony in this case showed that much of the property is a true wetland. Other portions of the wetland are marginal at best. Thus, to allow the "squaring off" of commercial lots on the perimeters of the property by use of small portions of carefully selected wetlands and the replacement of those with other comparable land is in this Court's view within the spirit of the law.

We must remember that the boundaries of a wetland, unlike those of a highway right of way, are much

less clearly defined. The Court believes that the legislative intent in this case is harmonious with the law of eminent domain.

Therefore, those portions of the property defined as being part of the Goga plan may be exempted from the taking in this case. Conversely, those portions of the "high lands" that were to be added to the wetlands as an exchange shall be deemed condemned.

III.

WHAT IS THE FAIR COMPENSATION FOR THE ACREAGE TAKEN?

During trial, the testimony placed a fair market value of $5,941,181 for the entire parcel. Consequently, Plaintiffs shall recover the percentage of that figure computed by dividing the acres taken by the total acreage of the parcel to reach a fair compensation.

IV.

Plaintiff has lost the use of the "Goga" property for several years, going back to the time that this property was first declared a wetland. There is no question that government has the right to reduce the size of the parcel taken as noted above. However, it would be unfair to allow the government to tie up the property for such an extended

time without some fair compensation awarded. However, this compensation is limited to that portion of the property not taken (the "Goga" property), since Plaintiffs will be awarded interest and fair market value on the portion actually condemned as a wetland. Thus, Plaintiffs shall recover the monthly overhead for carrying the portion of the property, i.e., interest payments, taxes, and insurance; that is being withheld from condemnation under the Goga plan. The Court is hopeful that the parties can agree on this figure without need for a further hearing. However, either side can ask for the Court's assistance on this point, if desired.

V.

MEDIATION FEES

This Court finds that mediation sanctions are available in this case. If either party has met the proper requirements, they may recover them.

VI.

ARE PLAINTIFFS ENTITLED TO INTEREST?

This Court awards interest to the Plaintiffs on the portion of the property condemned as a wetland from the date this lawsuit was began. Interest on the "carrying charges" for the Goga parcel shall run from the date of notice by the State of its intent to elect that remedy.

Plaintiffs are to prepare a judgment in conformity with this Opinion.

/s/ William E. Collette
William E. Collette
Circuit Court Judge

Dated: 05/04/93

PROOF OF MAILING

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Kevin T. Smith
Natural Resources Div.
P.O. Box 30028
Lansing, MI 48909

I do certify that I have served a copy of the attached order upon each attorney of record, by placing a copy of same in a sealed envelope, addressed to each, with full postage prepaid thereon and placing said envelope in the United States mail at Lansing, on 5/4, 1993.

/s/ Shawn H. Collins
Shawn H. Collins
Judicial Assistant

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

K & K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan corporation,
Plaintiffs,

File No. 88-12120-CM
Hon. William E. Collette

v

OPINION AND ORDER

THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES and STATE OF MICHIGAN,
Defendant.

INTRODUCTION

Plaintiffs, K & K Construction, Inc., J.F.K. Company, and Resorts and Company, have sued the State of Michigan alleging that certain property has been condemned because of its designation as a wetland. While there was some question in this Court's mind as to who the correct plaintiffs are, the parties have stipulated for purposes of this litigation that the (named) Plaintiffs have standing to bring this suit. After a non-jury trial, this matter was taken under advisement and briefs and exhibits have been submitted and reviewed by this Court. Following is this Courts Opinion and Order.

FACTS

The property in this lawsuit is located on Highway M-59 in Oakland County, just west of Telegraph Road. The total area of the property being considered is about 82 acres. The Plaintiffs, in varying combinations, are the owners of the affected property that consists of four clearly defined parcels.

Parcel One.

Parcel One was originally purchased by Joseph Kosik and several partners in 1976. The property was purchased for future commercial development because of Mr. Kosik's observations that M- 59 was going to become a busy thoroughfare over the next several years. This property is the primary subject of this lawsuit and contains about 55 acres of land.

In the 1980's, Mr. Kosik, his wife and J.P.K. Company (a limited partnership comprised of Mr. Kosik and his five children) became the sole owners of this parcel of property. Prior to any of the parcel being designated as a wetland, some commercial development of the property occurred with a Ram's Horn Restaurant constructed on a small piece of the property by Mr. Kosik.

Before the inception of this lawsuit, Mr. and Mrs. Kosik executed a quit claim deed of their interest in Parcel

A. This recorded deed conveyed their interest in the property to J.F.K. Company in anticipation of J.F.K. Company obtaining a substantial mortgage on the property to pay the Kosiks for their interests and to finance a C.J. Barrymore's restaurant on the property. Mr. Kosik testified that J.F.K. Company will be required to reconvey an interest in the property back to the Kosiks if J.F.K. Company is unable to obtain the required financing.

Shortly after the above conveyance, the Plaintiffs, complying with the law, applied for a wetlands assessment from the Michigan Department of Natural Resources. After a survey of the property by a field agent, the DNR determined that, of the 55 acres of Parcel 1 approximately 27 acres lying at the very heart of the property was a protected wetland as defined under the Goemaere-Anderson Wetland Protection Act,. MCLA Section, 281.701, et seq. Accordingly, a permit to develop the property was denied and this litigation followed.

Exhibit A is an aerial survey of Parcel One, as well as portions of Parcels Two, Three and Four. This exhibit demonstrates that the wetland comprises approximately fifty percent (50%) of Parcel One. As most often is the case, the boundaries of the wetland are not uniform. The terrain is such that large fingers of protected property run throughout the center of the property, as well as other numerous irregular boundaries. Parcel One is zoned C-2,

which is commercial under the Waterford Township zoning plan.

Parcel Two.

Parcel Two is the contiguous parcel consisting of 16 acres directly to the south of Parcel One. It was purchased under the same arrangements as Parcel One and came into the joint ownership of Mr. and Mrs. Kosik, and J.F.K. Company at the same time as Parcel One. Title to this property belongs solely to J.F.K. Company as a result of an irrevocable testamentary trust created by Mr. Kosik and Mrs. Kosik well before this litigation was commenced. This trust agreement cannot be altered by the Kosiks. The property is zoned R-2, which is multiple family residential. A review of Exhibit A shows that a large portion of this parcel also consists of a wetland. The testimony confirmed that a small lake is on this parcel as well.

Parcel Three.

At some point, J.F.K. Company became the Owner in partnership with Resorts and Company (another Michigan partnership) of 9.34 acres south of, and contiguous with, Parcel 2. This parcel is fronting to the west on North Oakland Boulevard. These two entities have constructed apartment: dwellings on this property that are in use today. This property is zoned R-2, the same as Parcel Two.

Parcel Four.

J.F.K. Company also owns a 3.4 acre parcel of undeveloped land at the southern border of Parcel 3 that is contiguous with Parcel 3. This Court believes the zoning on this parcel is R-2.

DISCUSSION

I.

"WHAT IS THE OVERALL SIZE OF THE PARCEL TO BE CONSIDERED IN DETERMINING IF A TAKING HAS OCCURRED IN THIS CASE?"

In a takings case under the Wetland Protection Act, the court must determine what effect the regulation has on the overall economic value and/or use of the subject property. In order to make this evaluation, it is critical to define the area of land that constitutes the affected parcel. Each factual situation must be evaluated on its own merits.

The Plaintiffs have taken the position that this Court must only consider the 27 acres that have been declared a wetland in determining if a taking has occurred. They contend that the Court must ignore the economic value of the balance of the property and focus solely on the restricted acreage. Such is not the case. The law is well

established that, in determining if a taking has occurred, the parcel as a whole must be considered. Penn Central Transportation Co v New York, 438 US 104; 98 S Ct 2646; 57 L Ed 2d

In Ciampitti v US, 22 Cl Ct 310 (1991), similar facts were addressed:

> "In the Case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity required a buffer, for example, around a housing development, a court would not entertain a separate Claim for the land dedicated to buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed. Factors such as the degree of contiguity, the dates of acquisition, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."

The Court noted that:

> "The Supreme Court has 'eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case.' Connolly v Pension Benefit Guar Corp., 475 US 211, 224, 106 S Ct 1018, 1026, 89 L Ed 166 (1986). To aid in this determination, certain significant factors have been identified. One that is of particular relevance is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . ." Penn Central Transp, 438 US at 124, 98 S Ct at 2659."

This Court concludes that we must look at more than just the regulated area. The question presented here is: "How much more?"

Defendant takes the position that the Court must include not only all of Parcel One in the analysis, but also Parcels Two, Three and Four. In support of this view, Defendant cites the fact that J.F.K. Company has an ownership interest in all the parcels, the parcels are contiguous, and Parcels Two, Three, and Four have significant present or potential economic value apart from the wetland areas.

In making a determination as to whether or not these three parcels can be considered in making a taking analysis as to Parcel One, this Court must follow the principals set forth in Bevan v. Braden Township, 438 Mich 385 (1991). In Bevan, the Michigan Supreme Court ruled that two contiguous parcels of property, owned by one person, with a unity of use were to be considered as one parcel in a taking analysis.

After analyzing this case under the above factors, it is this Court's opinion that there is not a unity of ownerShip between Parcel One and Parcels Two, Three and Four for the reasons set forth herein. While it is true that J.F.K. Company has an interest in all four parcels of property, only Parcels Two and Four are owned solely by J.F.K. Company or held for its benefit. Parcel Three is owned jointly by the J.F.K. Company and Plaintiff Resorts land Company.

It is true that the title to Parcel One is currently in the name of J.F.K. company. However, there is an equitable lien on the title to the property in favor of Mr. and Mrs. Kosik. The uncontroverted testimony at trial was that title to this parcel was transferred to J.F.K. Company by quit-claim deed for the sole purpose of obtaining mortgage financing. Mr. Kosik testified further that a deed to reconvey title would be required of J.F.K. Company if the financing could not be obtained. It is obvious that there can

be no unity of ownership with the other parcels due to the different interests that have title or equitable interest in Parcel One.

In analyzing the unity of use of the four parcels, one obvious fact is clear. Parcel One has commercial zoning, while Parcels Two, Three and Four are zoned residential. It is apparent that parcels with differing zoning ordinarily have differing legal uses. No evidence to the contrary was submitted, and this Court therefore finds no unity of use as to the four parcels.

While on the map all four parcels are contiguous with each other, the fact that Parcel One has different zoning from the other three parcels renders this factor less significant than it might ordinarily be.

As noted above, applying the tests in Bevan, supra, to the facts of this case, it is this Court's opinion that Parcel One should be considered as a separate parcel in assessing the economic impact on the subject parcel due to the wetland designation.

II.

"HAS THERE BEEN A TAKING OF PARCEL ONE?"

In deciding if a taking has occurred, the Court must review each case solely on its own merits. Penn Central

Trans Co v New York, supra. In making this determination, two general lines of inquiry have been developed to guide the reviewing Court. In Loveladies Harbor, Inc v US, 31 ERC 1848 {1990), the Court noted:

> "First, a taking can occur where the imposition of a government regulation fails to substantially advance a legitimate governmental interest . . . Second, a taking can occur where the imposition of a governmental regulation has the effect of depriving the owner's land of all economic value." (citations omitted)

Obviously, we are not concerned in this case with the first analysis since the preservation of wetland areas has been determined by the legislature to be of prime importance to the people of Michigan. MCL Section 281.703.

In determining whether a government regulation so pervasively affects an owner's land to the extent that it is deprived of all economic value so as to constitute a "taking," the Appellate Courts look to three factors:

1) The character of the government action;

2) The economic impact of the regulation on the claimant; and

3) The extent to which the regulation has interfered with reasonable investment-backed expectations.

Loveladies, supra, at 391, citing Keystone Bituminous Coal Ass'n v DeBenedictus, 480 US 470, 495 (1987).

A. The Character of the Government Action.

The designation of property as a wetland regulates the ability of an owner to use the property. Under the Wetland Protection Act, certain activities are prohibited without a special permit. These include:

a. Placing fill;

b. Removal of sailor minerals;

c. Any use or development; and

d. Draining of surface water.

Such restrictions, much like zoning laws that regulate building set backs, interfere with the ability to use property to the fullest extent. However, such regulation does not constitute a physical invasion or destruction of the property by government. Much like the lawns we grow on the restricted set-back areas of our residences, one is still free to enjoy many of the inherent rights of ownership. These include, among others, walking on the property;

excluding others from it; hunting and fishing; harvesting and so on.

Clearly, the government regulation in this case, standing alone, does not so severely hamper the owners' use of this property as to constitute a total destruction or complete taking of Plaintiffs' property.

B. <u>The Economic Impact on the Plaintiffs.</u>

As pointed out above, the designated wetland area is an extremely irregular-shaped piece, comprised of 27 acres, carved out of the very heart of this property. The configuration of the wetland creates shallow strips along the edges of the parcel where it would be possible to build. With the setback requirements of commercial property and the required parking, very little of the remaining land, along the roadway will be left for actual construction. The necessary act of evening off the edges of the buildable property where it abuts the wetlands will reduce the available acreage even more. The owners will be left with narrow strips of prime frontage with no prospect for any substantial economic development. While it is true that some financial value will remain, this Court finds that what little economic value remains is but a small faction of the economic value the property would have if all of it could be developed. This parcel is the last large commercial piece of property remaining on M-59 in Waterford Township and

was bought long ago for investment purposes. This Court concludes from the evidence presented that the property is essentially worthless as commercial real estate.

C. The Extent that the Regulation Has Interfered with Reasonable Investment-backed Expectations.

Unlike many cases this property was purchased specifically for commercial development in 1976. This was several years prior to the passage of the Wetland Protection Act. As can best be determined, this property has long been zoned and valued as desirable commercial real estate by Mr. Kosik and everyone else, including county and township government. The record discloses that over $20,000 per year in taxes are paid on this property. Over $2,455,000 has been invested in it since 1976.

The evidence disclosed that, unlike many protected properties, this land is not a characteristic wetland. The testimony indicates that heavy equipment has been driven all over it. It is mowed regularly without any problems. Numerous test borings done at Mr. Kosik's directions indicated that much of the property is sand, and it is suitable for construction with pilings needed in some areas.

This Court finds that the Plaintiffs in good faith purchased this property at significant expense, paid their commercial taxes without complaint, and are now being

deprived of the reasonable economic use of their property because of the applicability of wetland regulations that were not obvious to anyone. There does not appear to have been any effort by these Plaintiffs to attempt to manipulate the property to create a better case for themselves. To the contrary, many of the good faith actions by the Kosiks, such as conveying their interest in the property to J.F.K. Company, would tend to obviate the Plaintiffs' claims. It is obvious that there was no expectancy that this property would be deemed a wetland at any time prior to its designation as such by the DNR.[1]

According to the evidence, Plaintiff is unable to viably develop this property as it now sits with any reasonable expectation of recovering more than a small percentage of the monies invested in good faith in the property. Under a plan developed by Plaintiffs, while negotiating a possible resolution of this case (the "GOGA"

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[1]This Court feels compelled to comment concerning the failure of the State to prepare the Wetland inventory required by M.C.L.A. Sec. 281.719. Under that provision a preliminary assessment was to be done which would give the owners of property notice that their property might well fall under these regulations. Obviously, such an inventory, if completed would place these owners and others on notice of the potential character of their property. This Court notes that the Goemaere-Anderson Act was passed in 1979. It would seem that 13 years is long enough to have completed this assessment.

plan), approximately $800,000 to $1,000,000 could be realized by selling off parcels around the edges of the property. However, this plan requires that some of the wetlands be filled which would violate the law.

According to Mr. Kosik, the property is economically unusable as it now sits due to the zoning setback, parking, wetland and other regulations.

There was testimony from defense expert Mr. Paul Stoppert that he believed that the edges of the property could be economically developed. This was refuted by Plaintiffs' experts, Mr. Goga and Mr. James Clarkson. Also, Mr. Kosik's testimony refuted Mr. Stoppert. Based on the testimony, this Court finds that the ability of the Plaintiffs to locate small, relatively uneconomical buildings around the edges of this parcel does not make it economically viable.

In summary, this Court determines that the geographic configuration of the wetland so restricts the ability to use Parcel One, that the Plaintiffs have been deprived of any reasonable return on the good faith economic investment they have made.

This Court enters judgment for the Plaintiffs and finds that this property has been condemned by application of the Wetland Preservation Act.

THEREFORE, IT IS HRREBY ORDERED that the Defendant shall comply with Sec. 281.721 (3). The State shall determine which course of action under said Act it will take within 30 days of the date of this Opinion and Order. If the State shall decide to compensate the Plaintiffs for the value of the property then the compensation shall be twice the State equalized valuation of the affected property.[2]

IT IS SO ORDERED.

11/5/92

/s/ William E. Collette
WILLIAM E. COLLETTE

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[2] Section 281.721(4) requires that compensation not exceed twice the state equalized valuation. In this case, the commercial value exceeds twice that value, but Plaintiffs' recovery is limited by the law.

LEGAL NOTICE

Date 5-9-88

WHEREAS, violations of *Ordinances 147, & 91- Site Plan Ord. & Lowland Filling Ordinance*
Article_____, Section _____ of the Zoning Ordinance
Article_____, Section _____ of the Building Code
Article_____, Section _____ of the _____ Code

these premises, IT IS HEREBY ORDERED in accordance with the above Code that all persons cease, desist from and

O-1

STOP WORK

at once pertaining to construction, alterations or repairs on these premises known as *East Side of N. Oakland Blvd.*

All persons acting contrary to this order or removing or mutilating this notice are liable to arrest unless such action is authorized by the Department.

/s/ Thomas G. Blust
Building Official

STATE OF MICHIGAN

JAMES J. BLNCHRD, Governor
DEPARTMENT OF NATURAL RESOURCES
STEVENS T. MASON BUILDING
BOX 30028
LANSING, MI 48909

GORDON E. GUTER, Director

January 11, 1988

Ms. Julie A. Krohta
P.O. Box 7
Oxford, Michigan 48051

Dear Ms. Krohta:

As requested in your December 21, 1987 letter a review has been completed of a parcel within Oakland County, Waterford Township, T3N, R9E, Section 9 S.E.K. This review included interpretation of in office information only.

It has been determined that there is wetland regulated under the authority of the Goemaere-Anderson Wetland Protection ACT P.A. 203, 1979 within the parcel boundaries. A permit must be obtained prior to any filling, dredging, draining, or construction activities within this area. The attached map approximates the wetland location, wetlands are highlighted in green.

A permit under the authority of the Soil Erosion and Sedimentation Control Act, 1972 PA 347, must also be obtained from the local soil erosion control office, prior to any earth changes within 500 feet of a waterbody or of one acre in size or more.

A permit application and information about the Wetland Protection Act has been enclosed for your convenience. Should you have any questions please feel free to contact this office.

Sincerely,

/s/ Mathew MacGregor
Matthew MacGregor
Wetland Protection Unit
Land and Water Management Division

MM:sma
Enclosure
cc: LWMD-Pontiac, (D.Chippewa)

MI ST Ch. 281, Pree. 281.701, Refs & Annos

M.C.L.A. Ch. 281, Prec. 281.701, Refs & Annos

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

M.C.L.A. Ch. 281, Prec. 281.701, Refs & Annos

MI ST Ch. 281, Prec. 281.701, Refs & Annos

END OF DOCUMENT

MI ST281.701

M.C.L.A.281.701

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281. 701. Short title

Sec. 1. This act shall be known and may be cited as the "Goemaere~Anderson wetland protection act".

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 1, Eff. Oct. 1, 1980.

M.C.L.A. 281.701

MI ST 281.701

END OF DOCUMENT

MI ST 281.702

M.C.L.A. 281.702

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.702. Definitions

Sec. 2. As used in this act:

(a) "Department" means the department of natural resources.

(b) "Director" means the director of the department of natural resources.

(c) "Fill material" means soil, rocks, sand, waste of any kind, or any other material which displaces soil or water or reduces water retention potential.

(d) "Minor drainage" includes ditching and tiling for the removal of excess soil moisture incidental to the planting, cultivating, protecting, or harvesting of crops or improving the productivity of land in

established use for agriculture, horticulture, silviculture, or lumbering.

(e) "Municipality" means a city, village, township, or county.

(f) "Person" means an individual, sole proprietorship, partnership, corporation, association, municipality, this state, and instrumentality or agency of this state, the federal government, or an instrumentality or agency of the federal government, or other legal entity.

(g) "Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support and that under normal circumstances does support wetland vegetation or aquatic life and is commonly referred to as a bog, swamp, or marsh and which is any of the following:

(i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.

(ii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than 5 acres in size; except this subdivision shall not be of effect, except for the purpose of inventorying, in counties of less than 100,000 population until the department

certifies to the commission of natural resources it has substantially completed its inventory of wetlands in that county.

(iii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and 5 acres or less in size if the department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner; except this subdivision may be utilized regardless of wetland size in a county in which subdivision (ii) is of no effect; except for the purpose of inventorying, at the time.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 2, Eff. Oct. 1,1980. Amended by P.A.1992, No. 295, § I, Imd. Eff. Dec. 18, 1992.

M.C.L.A. 281.702

MI ST 281.702

M.C.L.A.281.702

MI ST 281.702

END OF DOCUMENT

MI ST 281.703

M.C.L.A. 281.703

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.703. Legislative findings

Sec. 3. (1) The legislature finds that:

(a) Wetland conservation is a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or wetland of other counties.

(b) A loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland:

(i) Flood and storm control by the hydrologic absorption and storage capacity of the wetland.

(ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of

wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.

(iii) Protection of subsurface water resources and provision of valuable watersheds and recharging ground water supplies.

(iv) Pollution treatment by serving as a biological and chemical oxidation basin.

(v) Erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(vi) Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.

(c) Wetlands are valuable as an agricultural resource for the production of food and fiber, including certain crops which may only be grown on sites developed from wetland.

(d) That the extraction and processing of nonfuel minerals may necessitate the use of wetland, if it is determined pursuant to section 9 [FN1] that the proposed activity is dependent upon being located in the wetland, and that a prudent and feasible alternative does not exist.

(2) In the administration of this act, the department shall consider the criteria provided in subsection (1).

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 3, Eff Oct. 1,1980.

[FN1] Section 281.709.

M.C.L.A. 281.703

MI ST 281. 703

MI ST 281.703

M.C.L.A. 281.703

END OF DOCUMENT

MI ST 281.704

M.C.L.A.281.704

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.704. Contract agreements for studies

Sec. 4. The department may enter into an agreement to make contracts with the federal government, other state agencies, municipalities, private agencies, or persons for the purposes of making studies for the efficient preservation, management, protection, and use of wetland resources. A study shall be available as a public record for distribution at cost as provided in section 4 of Act No. 442 of the Public Acts of 1976, being section 15.234 of the Michigan Compiled Laws.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 4, Eff. Oct. 1, 1980.

M. C. L. A. 281.704

MI ST 281.704
END OF DOCUMENT
Westlaw.

MI ST 281.705

M.C.L.A.281.705

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND PROTECTION ACT

281.705. Prohibited acts

Sec. 5. Except as otherwise provided by this act or by a permit obtained from the department under sections 7 to 12, [FN1] a person shall not:

(a) Deposit or permit the placing of fill material in a wetland.

(b) Dredge, remove, or permit the removal of soil or minerals from a wetland.

(c) Construct, operate, or maintain any use or development in a wetland.

(d) Drain surface water from a wetland.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 5, Eff. Oct. 1, 1980.

[FN1] Sections 281.707 to 281.712.

M.C.L.A. 281.705

MI ST 281.705

END OF DOCUMENT

MI ST 281.706

M.C.L.A. 281.706

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.706. Permissible uses

Sec. 6. (1) Activities which require a permit under the Great Lakes submerged lands act, Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Michigan Compiled Laws, or the inland lakes and streams act, Act No. 346 of the Public Acts of 1972, being sections 281.951 to 281.965 of the Michigan Compiled Laws, shall not require a permit under this act.

(2) The following uses shall be allowed in a wetland without a permit subject to other laws of this state and the owner's regulation:

(a) Fishing, trapping, or hunting.

(b) Swimming or boating.

(c) Hiking.

(d) Grazing of animals.

(e) Farming, horticulture, silviculture, lumbering, and ranching activities, including plowing, irrigation, irrigation ditching, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. Wetland altered under this subdivision shall not be used for a purpose other than a purpose described in this subsection without a permit from the department.

(f) Maintenance or operation of serviceable structures in existence on the effective date of this act or constructed pursuant to this act.

(g) Construction or maintenance of farm or stock ponds.

(h) Maintenance, operation, or improvement which includes straightening, widening, or deepening of the following which is necessary for the production or harvesting of agricultural products:

(i) An existing private agricultural drain.

(ii) That portion of a drain legally established pursuant to the drain code of 1956, Act No. 40 of the Public Acts of 1956, as amended, being sections 280.1 to 280.630 of the Michigan Compiled Laws, which

has been constructed or improved for drainage purposes.

(iii) A drain constructed pursuant to other provisions of this act.

(j) (FN1] Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining or forestry equipment, if the roads are constructed and maintained in a manner to assure that any adverse effect on the wetland will be otherwise minimized.

(k) Drainage necessary for the production and harvesting of agricultural products if the wetland is owned by a person who is engaged in commercial farming and the land is to be used for the production and harvesting of agricultural products. Except as otherwise provided in this act, wetland improved under this subdivision after the effective date of this act shall not be used for nonfarming purposes without a permit from the department. This subdivision shall not apply to a wetland which is contiguous to a lake or stream, or to a tributary of a lake or stream, or to a wetland which the department has determined by clear and convincing evidence to be a wetland which is necessary to be preserved for the public interest, in which case a permit shall be required.

(l) Maintenance or improvement of public streets, highways, or roads, within the right of way and in such a manner as to assure that any adverse effect on the wetland will be otherwise minimized. Maintenance or improvement does not include adding extra lanes; increasing the right of way; or deviating from the existing location ofthe street, highway, or road.

(m) Maintenance, repair, or operation of gas or oil pipelines and construction of gas or oil pipelines having a diameter of 6 inches or less, if the pipelines are constructed, maintained, or repaired in a manner to assure that any adverse effect on the wetland will be otherwise minimized.

(n) Maintenance, repair, or operation of electric transmission and distribution power lines and construction of distribution power lines if the distribution power lines are constructed, maintained, or repaired in a manner to assure that any adverse effect on the wetland will be otherwise minimized.

(0) Operation or maintenance, including reconstruction of recently damaged parts, of serviceable dikes and levees in existence on the effective date of this act or constructed pursuant to this act.

(p) Construction of iron and copper mining tailings basins and water storage areas.

(3) After the effective date of this act but immediately prior to the approval of a state program under section 404 of title 4 of the clean water act of 1977, 33 D.S.C. 1344, where a project solely involves the discharge of fill material subject to the individual permit requirements of section 404 of title 4 of the clean water act of 1977, 33 U.S.C. 1344, an additional permit shall not be required by this act.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 6, Eff. Oct. 1, 1980. Amended by P.A.1992, No. 295, § I, Imd. Eff. Dec. 18, 1992.

[FN1] So in enrolled bill.

M.C.L.A. 281.706

MI ST 281.706

END OF DOCUMENT

MI ST 281. 707

M.C.L.A.281.707

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.707. Permits; applications

Sec. 7. (1) Except as provided in section 8(4), [FN I] to obtain a permit for a use or development listed in section 5, [FN2] the person desiring the permit shall file an application with the department on a form provided by the department accompanied by a fee of $25.00. A person who has a permit for the particular activity under Act No. 346 of the Public Acts of 1972, or Act No. 61 of the Public Acts of 1939, as amended, being sections 319.1 to 319.27 of the Michigan Compiled Laws, does not need to pay the fee prescribed by this subsection. The application shall include:

(a) The person's name and address.

(b) The location of the wetland.

(c) A description of the wetland on which the use or development is to be made.

(d) A statement describing the proposed use or development.

(e) The wetland owner's name and address.

(f) An environmental assessment on a form supplied by the department, of the proposed use or development if requested by the department which shall include effects upon wetland benefits and the effects upon the water quality, flow, and levels, and the wildlife, fish, and vegetation within a contiguous lake, river, or stream.

(2) For the purposes of subsection (I), a proposed use or development of a wetland shall be considered as a single permit application under this act if the scope, extent, and purpose of a use or development are made known at the time of the application for the permit.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 7, Eff. Oct. I, 1980.

[FNI] Section 281.708(4).
[FN2] Section 281.705.

M.C.L.A. 281.707

MI ST 281.707
END OF DOCUMENT

MI ST 281.708

M.C.L.A.281.708

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.708. Permits; hearings; action on applications; municipal ordinances

Sec. 8. (1) Within 60 days after receipt of the completed application and fee, the department may hold a hearing. If a hearing is held, it shall be held in the county where the wetland on which the permit is to apply is located. Notice of the hearing shall be made in the same manner as for the promulgation of rules under the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws. The department may approve or disapprove a permit application without a public hearing unless a person requests a hearing in writing within 20 days after the mailing of notification of the permit application as required by subsection (3), or the department determines that the permit application is of significant impact to warrant a public hearing.

(2) If a hearing is not held, the department shall approve or disapprove the permit application within 90 days after the completed permit application is filed with the department. If a hearing is held, the department shall approve or disapprove the permit application within 90 days after the conclusion of the hearing. The department may approve a permit application, request modifications in the application, or deny the permit application. If the department approves the permit application, the department shall prepare and send the permit to the applicant. If the department denies, or requests a modification of, the permit application, the department shall send notice of the denial or modification request, and the reasons for the denial or the modifications requested to the applicant. Department approval may include the issuance of a permit containing conditions necessary for compliance with this act. If the department does not approve or disapprove the permit application within the time provided by this subsection, the permit application shall be considered approved, and the department shall be considered to have made the determinations required by section 9. [FNl] The action taken by the department may be appealed pursuant to Act No. 306 of the Public Acts of 1969, as amended. A property owner may, after

exhaustion of administrative remedies, bring appropriate legal action in a court of competent jurisdiction.

(3) A person who desires notification of pending permit applications may make a written request to the department accompanied by an annual fee of $25.00 which shall be credited to the general fund of the state. The department shall prepare a biweekly list of the applications made during the previous 2 weeks and shall promptly mail copies of the list for the remainder of the calendar year to the persons who requested notice. The biweekly list shall state the name and address of each applicant, the location of the wetland in the proposed use or development including the size of both the proposed use or development and of the wetland affected, and a summary statement of the purpose of the use or development.

(4) A municipality may regulate wetland within its boundaries, by ordinance, only as provided under this act. This subsection is supplemental to the existing authority of a municipality. An ordinance adopted by a municipality pursuant to this subsection shall comply with all ofthe following:

(a) The ordinance shall not provide a different definition of wetland than is provided in this act, except that a wetland ordinance may regulate wetland of less than 5 acres in size.

(b) If the ordinance regulates wetland that is smaller than 2 acres in size, the ordinance shall comply with section 8b. [FN2]

(c) The ordinance shall comply with sections 8a and 8c. [FN3]

(d) The ordinance shall not require a permit for uses that are authorized without a permit under section 6, [FN4] and shall otherwise comply with this act.

(5) Each municipality that adopts an ordinance regulating wetlands under subsection (4) shall notify the department.

(6) A municipality that adopts an ordinance regulating wetlands shall use an application form supplied by the department, and each person applying for a permit shall make application directly with the municipality. Upon receipt, the municipality shall forward a copy of each application to the department. The department shall begin reviewing the application as provided in this act. The

municipality shall review the application pursuant to its ordinance and shall modify, approve, or deny the application within 90 days after receipt. The denial of a permit shall be accompanied by a written reason for denial. The failure to supply complete information with a permit application may be reason for denial of a permit. The department shall inform any interested person whether a municipality has an ordinance regulating wetlands. If the department receives an application with respect to a wetland which is located in a municipality which has an ordinance regulating wetlands, the department immediately shall forward the application to the municipality, which shall modify, deny, or approve the application under this subsection. The municipality shall notify the department of its decision. The department shall proceed as provided in this act.

(7) If a municipality does not have an ordinance regulating wetlands, the department shall promptly send a copy of the permit application to the municipality where the wetland is located. The municipality may review the application; may hold a hearing on the application; and may recommend approval, modification, or denial of the application to the department. The recommendations of the municipality shall be made and returned to the

department within 45 days after the municipality's receipt of the permit application. The department shall approve, modify, or deny the application as provided in this act.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 8, Eff. Oct. 1, 1980. Amended by P.A.1992, No. 295, § 1, Imd. Eff. Dec. 18,1992.

[FN1] Section 281.709.
[FN2] Section 281.708b.
[FN3] Sections 281.708a and 281.708c.
[FN4] Section 281.706.

M.C.L.A. 281.708

MI ST 281.708

END OF DOCUMENT

MI ST 281. 708a

M.C.L.A. 281.708a

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.708a. Wetland ordinances; inventory maps; hearings on use applications

Sec. 8a. (1) Prior to the effective date of an ordinance authorized under section 8(4), [FN1] a municipality that wishes to adopt such an ordinance shall complete and make available to the public at a reasonable cost an inventory of all wetland within the municipality, except that a municipality located in a county that has a population of less than 100,000 is not required to include public lands on its map. A municipality shall make a draft of the inventory map available to the public, shall provide for public notice and comment opportunity prior to finalizing the inventory map, and shall respond in writing to written comments received by the municipality regarding the contents of the inventory. A municipality that has a wetland ordinance on the effective date of this section has 18 months from that date to complete an inventory map and to otherwise comply

with this act or the municipality shall not continue to enforce that ordinance. Upon completion of an inventory map or upon a subsequent amendment of an inventory map, the municipality shall notify each record owner of property on the property tax roll of the municipality that the inventory maps exist or have been amended, where the maps may be reviewed, that the owner's property may be designated as a wetland on the inventory map, and that the municipality has an ordinance regulating wetland. The notice shall also inform the property owner that the inventory map does not necessarily include all of the wetlands within the municipality that may be subject to the wetland ordinance. The notice may be given by including the required information with the annual notice of the property owner's property tax assessment. A wetland inventory map does not create any legally enforceable presumptions regarding whether property that is or is not included on the inventory map is or is not in fact a wetland.

(2) A municipality that adopts a wetland ordinance shall process wetland use applications in a manner that ensures that the same entity makes decisions on site plans, plats, and related matters, and wetland determinations and that the applicant is not required to submit to a hearing on the application before more than 1 municipal decision making body. This requirement does not apply to either of the following:

(a) A preliminary review by a planning department, planning consultant, or planning commission, prior to submittal to the decision making body if required by an ordinance.

(b) An appeal process that is provided for appeal to the legislative body or other body designated to hear appeals.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 8a, added by P.A.1992, No. 296, § 1, Imd. Eff. Dec. 18,1992.

[FN1] Section 281.708(4).

M.C.L.A. 281.708a

MI ST 281.708a

END OF DOCUMENT

MI ST 281.708b

M.C.L.A.281.708b

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281. 708b. Wetland use permits for wetlands less than 2 acres in size, municipalities; disapproval; written findings

Sec. 8b. A municipality that has adopted an ordinance under section 8(4) [FN1] that regulates wetland within its jurisdiction that is less than 2 acres in size shall comply with this section. Upon application for a wetland use permit in a wetland that is less than 2 acres in size, the municipality shall approve the permit unless the municipality determines that the wetland is essential to the preservation of the natural resources of the municipality and provide these findings, in writing, to the permit applicant stating the reasons for this determination. In making this determination, the municipality must find that I or more of the following exist at the particular site:

(a) The site supports state or federal endangered or threatened plants, fish, or wildlife appearing on a

list specified in section 6 of the endangered species act of 1974, Act No. 203 of the Public Acts of 1974, being section 299.226 of the Michigan Compiled Laws.

(b) The site represents what is identified as a locally rare or unique ecosystem.

(c) The site supports plants or animals of an identified local importance.

(d) The site provides groundwater recharge documented by a public agency.

(e) The site provides flood and storm control by the hydrologic absorption and storage capacity of the wetland.

(f) The site provides wildlife habitat by providing breeding, nesting, or feeding grounds or cover for forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.

(g) The site provides protection of subsurface water resources and provision of valuable watersheds and recharging groundwater supplies.

(h) The site provides pollution treatment by serving as a biological and chemical oxidation basin.

(i) The site provides erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(j) The site provides sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 8b, added by P.A.1992, No. 295, § I, Imd. Eff. Dec. 18, 1992.

[FN1] Section 281.708(4).

M.C.L.A. 281.708b

MI ST 281. 708b

MI ST 281.708b M.C.L.A.281.708b

END OF DOCUMENT

MI ST281.708c

M.C.L.A.281.708c

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
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PROTECTION ACT

281.708c. Municipal ordinances; denial of wetland use permits; request for revaluation of fair market value, judicial review; right to institute civil proceedings

Sec. 8c. (1) A municipality that adopts an ordinance authorized under section 8(4) [FNI] shall include in the ordinance a provision that allows a landowner to request a revaluation of the affected property for assessment purposes to determine its fair market value under the use restriction if a permit is denied by a municipality for a proposed wetland use. A landowner who is aggrieved by a determination, action, or inaction under this subsection may protest and appeal that determination, action, or inaction pursuant to the general property tax act, Act No. 206 of the Public Acts of 1893, being sections 211.1 to 211.157 of the Michigan Compiled Laws.

(2) If a permit applicant is aggrieved by a determination, action, or inaction by the municipality regarding the issuance of a permit that person may seek judicial review in the same manner as provided in the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) This section does not limit the right of a wetland owner to institute proceedings in any circuit of the circuit court of the state against any person when necessary to protect the wetland owner's rights.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 8c, added by P.A.1992, No. 295, § I, Imd. Eff. Dec. 18, 1992.

[FNI] Section 281.708(4).

M. C. L. A. 281. 708c

MI ST 281.708c

END OF DOCUMENT

MI ST281.709

M.C.L.A.281.709

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
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PROTECTION ACT

281.709. Permits; criteria for approval

Sec. 9. (I) A permit for an activity listed in section 5 [FNI] shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.

(2) In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity. The decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction. The following general criteria shall be considered:

(a) The relative extent of the public and private need for the proposed activity.

(b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

(c) The extent and permanence of the beneficial or detrimental effects which the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

(d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities in the watershed.

(e) The probable impact on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.

(f) The size of the wetland being considered.

(g) The amount of remaining wetland in the general area.

(h) Proximity to any waterway.

(i) Economic value, both public and private, of the proposed land change to the general area.

(3) In considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies.

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 3 [FN2] and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) A feasible and prudent alternative does not exist.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 9, Eff. Oct. I, 1980.

[FNI] Section 281.705.

[FN2] Section 281.703.

M.C.L.A. 281.709

MI ST 281.709
END OF DOCUMENT

MI ST 281.710

M.C.L.A. 281.710

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
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PROTECTION ACT

281.710. General permits; issuance

Sec. 10. (1) The department, after notice and opportunity for a public hearing, may issue general permits on a state or county basis for a category of activities if the department determines that the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. A general permit issued under this subsection shall be based on the requirements of this act and the rules promulgated under this act, and shall set forth the requirements and standards which shall apply to an activity authorized by the general permit.

(2) The department may impose conditions on a permit for a use or development if the conditions are designed to remove an impairment to the wetland

benefits, to mitigate the impact of a discharge of fill material, or to otherwise improve the water quality.

(3) The department may establish a reasonable time when the construction, development, or use is to be completed or terminated. A general permit shall not be valid for more than 5 years.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 10, Eff. Oct. I, 1980.

M.C.L.A. 281.710

MI ST 281.710

END OF DOCUMENT

MI ST 281.711

M.C.L.A. 281.711

MICHIGAN COMPILED LAWS ANNOTATED
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PROTECTION ACT

281.711. Revocation or modification of general permits

Sec. 11. (1) A general permit may be revoked or modified if, after opportunity for a public hearing or a contested case hearing under Act No. 306 of the Public Acts of 1969, as amended, [FN1] the department determines that the activities authorized by the general permit have an adverse impact on the environment or the activities would be more appropriately authorized by an individual permit.

(2) A permit may be terminated or modified for cause, including:

(a) A violation of a condition of the permit.

(b) Obtaining a permit by misrepresentation or failure to fully disclose relevant facts.

(c) A change in a condition that requires a temporary or permanent change in the activity.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 11, Eff. Oct. 1, 1980.

[FN1] Sections 24.201 to 24.315.

M.C.L.A. 281.711

MI ST 281.711

END OF DOCUMENT

MI ST 281.712
M.C.L.A.281.712

MICHIGAN COMPILED LAWS ANNOTATED
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281.712. Information required to be furnished; entry upon premises

Sec. 12. (1) The department shall require the holder of a permit to provide information the department reasonably requires to obtain compliance with this act.

(2) Upon reasonable cause or obtaining a search warrant, the department may enter on, upon, or through the premises on which an activity listed in section 5 [FN1] is located or on which information required to be maintained under subsection (1) is located.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 12, Eff. Oct. 1, 1980.

[FN1] Section 281.705.

M. C. L. A. 281.712
MI ST 281.712
END OF DOCUMENT

MI ST 281.713

M.C.L.A. 281.713

MICHIGAN COMPILED LAWS ANNOTATED
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PROTECTION ACT

281.713. Violations; order for compliance; civil actions

Sec. 13. (1) If, on the basis of information available to the department, the department finds that a person is in violation of this act or a condition set forth in a permit issued under section 9 or 10, [FN1] the department shall issue an order requiring the person to comply with the prohibitions or conditions or the department shall request the attorney general to bring a civil action under section 14(1). [FN2]

(2) An order issued under subsection (1) shall state with reasonable specificity the nature of the violation and shall specify a time for compliance, not to exceed 30 days, which the department determines is reasonable, taking into account the seriousness of the violation and good faith efforts to comply with applicable requirements.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 13, Eff. Oct. I, 1980.

[FN1] Section 281.709 or 281.710.

[FN2] Section 281.714(1).

M.C.L.A. 281.713

MI ST 281.713

END OF DOCUMENT

MI ST281.714

M.C.L.A.281.714

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.714. Civil actions by attorney general; fines and penalties

Sec. 14. (1) The attorney general may commence a civil action for appropriate relief, including injunctive relief upon request of the department under section 13(1). [FNI] An action under this subsection may be brought in the circuit court for the county of Ingham or for a county in which the defendant is located, resides, or is doing business. The court has jurisdiction to restrain the violation and to require compliance with this act. In addition to any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation. A person who violates an order of the court shall be subject to a civil fine not to exceed $10,000.00 for each day of violation.

(2) A person who violates this act is guilty of a misdemeanor, punishable by a fine of not more than $2,500.00.

(3) A person who wilfully or recklessly violates a condition or limitation in a permit issued by the department under this act, or a corporate officer who has knowledge of or is responsible for a violation, is guilty of a misdemeanor, punishable by a fine of not less than $2,500.00 nor more than $25,000.00 per day of violation, or by imprisonment for not more than 1 year, or both. A person who violates this section a second or subsequent time is guilty of a felony, punishable by a fine of not more than $50,000.00 for each day of violation, or by imprisonment for not more than 2 years, or both.

(4) In addition to the penalties provided under subsections (1), (2), and (3), the court may order a person who violates this act to restore as nearly as possible the wetland which was affected by the violation, to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 14, Eff. Oct. I, 1980.
[FNI] Section 281.713(1).
M.C.L.A. 281.714
MI ST 281.714
END OF DOCUMENT

MI ST 281.715

M.C.L.A. 281.715

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.715. Fees and civil fines; deposit in general fund of state or municipality

Sec. 15. The fees and civil fines collected under this act shall be deposited in the general fund of the state. Other than criminal fines, funds collected by a municipality under an ordinance authorized under section 8(4), [FN1] shall be deposited in the general fund of the municipality.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 15, Eff. Oct. 1, 1980. Amended by P.A.1992, No. 295, § 1, Imd. Eff. Dec. 18, 1992.

[FN1] Section 281.708(4).

M.C.L.A. 281.715

MI ST 281.715

END OF DOCUMENT

MI ST 281.716

M.C.L.A.281.716

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RNERS
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PROTECTION ACT

281.716. Revaluation of property

Sec. 16. If a permit is denied for a proposed wetland activity, the landowner may request a revaluation of the affected property for assessment purposes to determine its fair market value under the use restriction.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 16, Eff. Oct. 1, 1980.

M.C.L.A. 281.716

MI ST 281.716

END OF DOCUMENT

MI ST 281.717

M.C.L.A.281.717

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.717. Rules; hearings; judicial review

Sec. 17. (1) The department shall promulgate and enforce rules to implement this act pursuant to Act No. 306 of the Public Acts of 1969, as amended. [FNI]

(2) If a person is aggrieved by any action or inaction of the department, the person may request a formal hearing on the matter involved. The hearing shall be conducted by the department pursuant to Act No. 306 of the Public Acts of 1969, as amended.

(3) A determination, action, or inaction by the department following the hearing shall be subject to judicial review as provided in Act No. 306 of the Public Acts of 1969, as amended.

(4) This section does not limit the right of a wetland owner to institute proceedings in any circuit of the

circuit court of the state against any person when necessary to protect the wetland owner's rights.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 17, Eff. Oct. 1, 1980.

[FN1] Sections 24.201 to 24.315.

M.C.L.A. 281.717

MI ST 281.717

END OF DOCUMENT

MI ST 281.718
M.C.L.A. 281. 718

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
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PROTECTION ACT

281.718. Inventories of wetlands; maps, surveys, etc.

Sec. 18. (1) As inventories of wetland are completed, the inventories shall be used as 1 of the criteria by the department in issuing permits. The inventories shall be periodically updated. The maps, ground surveys, and descriptions of wetlands included in the inventories shall be submitted to the respective county register of deeds and shall become a public document available to review by any member of the public.

(2) Aerial photographs and satellite telemetry data reproductions shall be made available to the respective county register of deeds for cost as determined by the department.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 18, Eff. Oct. 1, 1980.
M.C.L.A. 281.718
MI ST 281.718
END OF DOCUMENT

MI ST 281.719

M.C.L.A. 281.719

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.719. Preliminary inventory of wetlands; hearings; written determinations

Sec. 19. (1) The department shall make or cause to be made a preliminary inventory of all wetland in this state on a county by county basis and file the inventory with the agricultural extension office, register of deeds, and county clerk.

(2) At least 2 hearings shall be held in each state planning and development region created by Executive Directive No. 1973-1. The hearing shall be held by the department after publication and due notice so that interested parties may comment on the inventory. After the hearings the department shall issue a final inventory which shall be sent and kept by the agricultural extension office, register of deeds, and county clerk. Legislators shall receive an inventory of a county or regional classification for their districts including both preliminary and final

inventories unless the legislators request not to receive the materials.

(3) Before an inventory is made of a county, interested persons may request the department to inspect property and the department shall make a written wetland determination. The determination shall be made within a reasonable time after the request. Completion of the inventory shall not delay implementation of this act.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 19, Eff. Oct. 1, 1980.

M.C.L.A. 281.719

MI ST 281.719

END OF DOCUMENT

MI ST 281. 720
M.C.L.A. 281.720

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
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PROTECTION ACT

281.720. Notice to property owners of change in status

Sec. 20. As wetland inventories are completed as specified in section 19, [FN1] owners of record as identified by the current property tax roll shall be notified of the possible change in the status of their property. Notification shall be printed on the next property tax bill mailed to property owners in the county. It shall contain information specifying that a wetland inventory has been completed and is on file with the agricultural extension office, register of deeds, and county clerk, and that property owners may be subject to regulation under this act.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 20, Eff. Oct. 1, 1980.

[FN1] Section 281.719.

M.C.L.A. 281.720
MI ST 281.720
END OF DOCUMENT

MI ST 281.721

M.C.L.A.281.721

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 281. LAKES AND RIVERS
GOEMAERE-ANDERSON WETLAND
PROTECTION ACT

281.721. Taking without compensation

Sec. 21. (1) This act shall not be construed to abrogate rights or authority otherwise provided by law.

(2) For the purposes of determining if there has been a taking of property without just compensation under state law, an owner of property who has sought and been denied a permit from the state or from a municipality that adopts an ordinance pursuant to section 8(4) [FN1] or has been made subject to modifications or conditions in the permit under this act or the action or inaction of the department pursuant to this act or a municipality that adopts an ordinance pursuant to section 8(4) may file an action in a court of competent jurisdiction.

(3) If the court determines that an action of the department or a municipality pursuant to this act or an ordinance authorized pursuant to section 8(4)

constitutes a taking of the property of a person then the court shall order the department or the municipality, at the department's or the municipality's option, as applicable, to do I or more of the following:

(a) Compensate the property owner for the full amount of the lost value.

(b) Purchase the property in the public interest as determined before its value was affected by this act or the local ordinance authorized under section 8(4) or the action or inaction of the department pursuant to this act or the municipality pursuant to its ordinance.

(c) Modify its action or inaction with respect to the property so as to minimize the detrimental affect to the property's value.

(4) For the purposes of this section, the value of the property may not exceed that share which the area in dispute occupies in the total parcel of land, of the state equalized evaluation of the total parcel, multiplied by 2, as determined by an inspection of the most recent assessment roll of the township or city in which the parcel is located.

P.A.1979, No. 203, § 21, Eff. Oct. 1, 1980. Amended by P.A.1992, No. 295, § 1, Imd. Eff. Dec. 18, 1992.

[FN1] Section 281.708(4).

M.C.L.A. 281.721

MI ST 281.721

END OF DOCUMENT

MI ST 281. 722

M.C.L.A.281.722

MICHIGAN COMPILED LAWS ANNOTATED
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281.722. Effective date

Sec. 22. This act shall take effect October 1, 1980.

1993 Pocket Part Credit(s)

P.A.1979, No. 203, § 22, Eff. Oct. 1, 1980.

M.C.L.A. 281.722

MI ST 281.722

END OF DOCUMENT

Michigan Compiled laws Annotated Currentness
Chapter 324. Natural Resources and Environmental Protection Act
Natural Resources and Environmental Protection Act (Refs & Annos)
Article III. Natural Resources Management
Chapter 1. Habitat Protection
Inland Waters
→ Part 303. Wetland Protection (Refs & Annos)

324.30301. Definitions

Sec. 30301. As used in this part:

(a) "Beach" means the area landward of the shoreline of the Great lakes as the term shoreline is defined in section 32301. [FN1]

(b) "Beach maintenance activities" means any of the following in the area of Great lakes bottomlands lying below the ordinary high-water mark and above the water's edge:

(i) Manual or mechanized leveling of sand.

(ii) Mowing of vegetation.

(iii) Manual de minimis removal of vegetation.

(iv) Grooming of soil.

(v) Construction and maintenance of a path.

(c) "Debris" means animal or fish carcasses, zebra mussel shells, dead vegetation, trash, and discarded materials of human-made origin.

(d) "Department" means the department of environmental quality.

(e) "Director" means the director of the department.

(f) "Fill material" means soil, rocks, sand, waste of any kind, or any other material that displaces soil or water or reduces water retention potential.

(g) "Environmental area" means an environmental area as defined in section 32301.

(h) "Grooming of soil" means raking or dragging, pushing, or pulling metal teeth through the top 4 inches of soil without disturbance of or destruction to plant roots, for the purpose of removing debris.

(i) "Leveling of sand" means the relocation of sand within areas being leveled that are predominantly free of vegetation, including the redistribution, grading, and spreading of sand that has been deposited through wind or wave action onto upland riparian property.

(j) "Minor drainage" includes ditching and tiling for the removal of excess soil moisture incidental to the

planting, cultivating, protecting, or harvesting of crops or improving the productivity of land in established use for agriculture, horticulture, silviculture, or lumbering.

(k) "Mowing of vegetation" means the cutting of vegetation to a height of not less than 2 inches, without disturbance of soil or plant roots.

(l) "Ordinary high-water mark" means that term as it is defined in section 32502. [FN2]

(m) "Path" means a temporary access walkway from the upland riparian property directly to the shoreline across swales with standing water, not exceeding 6 feet in bottom width and consisting of sand and pebbles obtained from the exposed, nonvegetated bottom lands or from the upland riparian property .

(n) "Person" means an individual, sole proprietorship, partnership, corporation, association, municipality, this state, an instrumentality or agency of this state, the federal government, an instrumentality or agency of the federal government, or other legal entity.

(o) "Removal of vegetation" means the manual or mechanized removal of vegetation, other than the manual de minimis removal of vegetation.

(p) "Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a

(ii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than 5 acres in size; except this subparagraph shall not be of effect, except for the purpose of inventorying, in counties of less than 100,000 population until the department certifies to the commission it has substantially completed its inventory of wetlands in that county.

(iii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and 5 acres or less in size if the department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner; except this subparagraph may be utilized regardless of wetland size in a county in which subparagraph (ii) is of no effect; except for the purpose of inventorying, at the time.

[FN1] M.C.L.A. § 324.32301.

[FN2] M.C.L.A. § 324.32502.

324.30302. Legislative findings

Sec. 30302. (1) The legislature finds that:

(a) Wetland conservation is a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or wetland of other counties.

(b) A loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland:

(i) Flood and storm control by the hydrologic absorption and storage capacity of the wetland.

(ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.

(iii) Protection of subsurface water resources and provision of valuable watersheds and recharging ground water supplies.

(iv) Pollution treatment by serving as a biological and chemical oxidation basin.

(v) Erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(vi) Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.

(c) Wetlands are valuable as an agricultural resource for the production of food and fiber, including certain crops which may only be grown on sites developed from wetland.

(d) That the extraction and processing of nonfuel minerals may necessitate the use of wetland, if it is determined pursuant to section 30311 that the proposed activity is dependent upon being located in the wetland and that a prudent and feasible alternative does not exist.

(2) In the administration of this part, the department shall consider the criteria provided in subsection (1).

324.30303. Contract agreements for studies

Sec. 30303. The department may enter into an agreement to make contracts with the federal government, other state agencies, local units of government, private agencies, or persons for the purposes of making studies for the efficient preservation, management, protection, and use of wetland resources. A study shall be available as a public record for distribution at cost as provided in section 4 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.234 of the Michigan Compiled Laws.

324.30304. Prohibited acts

Sec. 30304. Except as otherwise provided in this part or by a permit issued by the department under sections 30306 to 30314 [FN1] and pursuant to part 13, [FN2] a person shall not do any of the following:

(a) Deposit or permit the placing of fill material in a wetland.

(b) Dredge, remove, or permit the removal of soil or minerals from a wetland.

(c) Construct, operate, or maintain any use or development in a wetland.

(d) Drain surface water from a wetland.

[FN1] M.C.L.A. §§ 324.30306 to 324.30314.

[FN2] M.C.L.A. & 324.1301 et seq.

324.30305. Permissible uses

Sec. 30305. (1) Activities that require a permit under part 325 [FN1] or part 301 [FN2] or a discharge that is authorized by a discharge permit under section 3112 or 3113 [FN3] do not require a permit under this part.

(2) The following uses are allowed in a wetland without a permit subject to other laws of this state and the owner's regulation:

(a) Fishing, trapping, or hunting.

(b) Swimming or boating.

(c) Hiking.

(d) Grazing of animals.

(e) Farming, horticulture, silviculture, lumbering, and ranching activities, including plowing, irrigation, irrigation ditching, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. Wetland altered under this subdivision shall not be used for a purpose other than a purpose described in this subsection without a permit from the department.

(f) Maintenance or operation of serviceable structures in existence on October 1, 1980 or constructed pursuant to this part or former 1979 PA 203.

(g) Construction or maintenance of farm or stock ponds.

(h) Maintenance, operation, or improvement which includes straightening, widening, or deepening of the

following which is necessary for the production or harvesting of agricultural products:

(i) An existing private agricultural drain.

(ii) That portion of a drain legally established pursuant to the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630, which has been constructed or improved for drainage purposes.

(iii) A drain constructed pursuant to other provisions of this part or former 1979 PA 203.

(i) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining or forestry equipment, if the roads are constructed and maintained in a manner to assure that any adverse effect on the wetland will be otherwise minimized.

(j) Drainage necessary for the production and harvesting of agricultural products if the wetland is owned by a person who is engaged in commercial farming and the land is to be used for the production and harvesting of agricultural products. Except as otherwise provided in this part, wetland improved under this subdivision after October 1, 1980 shall not be used for nonfarming purposes without a permit from the department. This subdivision does not apply to a wetland that is contiguous to a lake or stream, or to a tributary of a lake or stream, or to a wetland that the

department has determined by clear and convincing evidence to be a wetland that is necessary to be preserved for the public interest, in which case a permit is required.

(k) Maintenance or improvement of public streets, highways, or roads, within the right-of-way and in such a manner as to assure that any adverse effect on the wetland will be otherwise minimized. Maintenance or improvement does not include adding extra lanes, increasing the right-of-way, or deviating from the existing location of the street, highway, or road.

(l) Maintenance, repair, or operation of gas or oil pipelines and construction of gas or oil pipelines having a diameter of 6 inches or less, if the pipelines are constructed, maintained, or repaired in a manner to assure that any adverse effect on the wetland will be otherwise minimized.

(m) Maintenance, repair, or operation of electric transmission and distribution power lines and construction of distribution power lines, if the distribution power lines are constructed, maintained, or repaired in a manner to assure that any adverse effect on the wetland will be otherwise minimized.

(n) Operation or maintenance, including reconstruction of recently damaged parts, of serviceable dikes and levees in existence on October 1, 1980 or constructed pursuant to this part or former 1979 PA 203.

(o) Construction of iron and copper mining tailings basins and water storage areas.

(p) Until November 1, 2007, beach maintenance activities that meet all of the following conditions:

(i) The activities shall not occur in environmental areas and shall not violate part 365 [FN4] or rules promulgated under that part, or the endangered species act of 1973, Public Law 93-205, 87 Stat. 884, or rules promulgated under that act.

(ii) The width of any mowing of vegetation shall not exceed the width of the riparian property or 100 feet, whichever is less.

(iii) All collected debris shall be disposed of properly outside of any wetland.

(q) Until 3 years after the effective date of the amendatory act that added this subdivision, removal of vegetation as authorized under section 32516. [FN5]

(3) An activity in a wetland that was effectively drained for farming before October 1, 1980 and that on and after October 1, 1980 has continued to be effectively drained as part of an ongoing farming operation is not subject to regulation under this part.

(4) A wetland that is incidentally created as a result of 1 or more of the following activities is not subject to regulation under this part:

(a) Excavation for mineral or sand mining, if the area was not a wetland before excavation. This exemption does not include a wetland on or adjacent to a water body of 1 acre or more in size.

(b) Construction and operation of a water treatment pond or lagoon in compliance with the requirements of state or federal water pollution control regulations.

(c) A diked area associated with a landfill if the landfill complies with the terms of the landfill construction permit and if the diked area was not a wetland before diking.

[FN1] M.C.L.A. § 324.32501 et seq.

[FN2] M.C.L.A. § 324.30101 et seq.

[FN3] M.C.L.A. &§ 324.3112 or 324.3113.

[FN4] M.C.L.A. § 324.36501 et seq.

[FN5] M.C.L.A. ~ 324.32516.

324.30306. Permits; applications

Sec. 30306. (1) Except as provided in section 30307(6), [FN1] to obtain a permit for a use or development listed in section 30304, [FN2] a person shall file an application with the department on a form provided by the department. The application shall include all of the following:

(a) The person's name and address.

(b) The location of the wetland.

(c) A description of the wetland on which the use or development is to be made.

(d) A statement and appropriate drawings describing the proposed use or development.

(e) The wetland owner's name and address.

(f) An environmental assessment of the proposed use or development if requested by the department, which assessment shall include the effects upon wetland benefits and the effects upon the water quality, flow, and levels, and the wildlife, fish, and vegetation within a contiguous lake, river, or stream.

(2) For the purposes of subsection (1), a proposed use or development of a wetland shall be considered as a single permit application under this part if the scope, extent, and

purpose of a use or development are made known at the time of the application for the permit.

(3) Except as provided in subsections (4) and (5), an application for a permit submitted under subsection (1) shall be accompanied by the following fee:

(a) For a project in a category of activities for which a general permit is issued under section 30312, [FN3] a fee of $100.00.

(b) For a permit for the removal of vegetation in an area that is not more than 100 feet wide or the width of the property, whichever is less, or the mowing of vegetation in excess of what is allowed in section 30305(2)(p)(ii), [FN4] in the area between the ordinary high-water mark and the water's edge, a fee of $50.00.

(c) For a major project, including any of the following, a fee of $2,000.00:

(i) Filling or draining of 1 acre or more of coastal or inland wetland.

(ii) 10,000 cubic yards or more of wetland fill.

(iii) A new golf course impacting wetland.

(iv) A subdivision impacting wetland.

(v) A condominium impacting wetland.

(d) For all other projects, a fee of $500.00.

(4) A project that requires review and approval under this part and 1 or more of the following is subject to only the single highest permit fee required under this part or the following:

(a) Section 3104. [FN5]

(b) Part 301. [FN6]

(c) Part 323. [FN7]

(d) Part 325. [FN8]

(e) Section 117 of the land division act, 1967 PA 288, MCL 560.117.

(5) If work has been done in violation of a permit requirement under this part and restoration is not ordered by the department, the department may accept an application for a permit if the application is accompanied by a fee equal to twice the permit fee required under this section.

(6) If the department determines that a permit is not required under this part, the department shall promptly refund the fee paid under this section.

[FN1] M.C.L.A. § 324.30307.

[FN2] M.C.L.A. § 324.30304.

[FN3] M.C.L.A. § 324.30312.

[FN4] M.C.L.A. § 324.30305.

[FN5] M.C.L.A. § 324.3104.

[FN6] M.C.L.A. § 324.30101 et seq.

[FN7] M.C.L.A. § 324.32301 et seq.

[FN8] M.C.L.A. § 324.32501 et seq.

324.30306b. Preapplication meetings; written request; review of proposed project or permit application; place; fee; withdrawal; rescheduling; written agreements; duration of effect

Sec. 30306b. (1) If a preapplication meeting is requested in writing by the landowner or another person who is authorized in writing by the landowner, the department shall meet with the person or his or her representatives to review a proposed project or a proposed permit application in its entirety. The preapplication meeting shall take place at the department's district office for the district that includes the project site or at the project site itself, as specified in the request.

(2) Except as provided in this subsection, the request shall be accompanied by a fee. The fee for a preapplication meeting at the district office is $150.00. The fee for a preapplication meeting at the project site is $250.00 for the first acre or portion of an acre of project area, plus $50.00 for each acre or portion of an acre in excess of the first acre, but not to exceed a fee of $1,000.00. However, if the location of the project is a single family residential lot that is less than 1 acre in size, there is no fee for a preapplication meeting at the district office, and the fee for a preapplication meeting at the project site is $100.00.

(3) If the person withdraws the request at least 24 hours before the preapplication meeting, the department may agree with the person to reschedule the meeting or shall promptly refund the fee and need not meet as provided in this section. Otherwise, if, after agreeing to the time and place for a preapplication meeting, the person is not represented at the meeting, the person shall forfeit the fee for the meeting. If, after agreeing to the time and place for a preapplication meeting, the department is not represented at the meeting, the department shall refund the fee and send a representative to a rescheduled meeting to be held within 10 days of the first scheduled meeting date.

(4) Any written agreement provided by the department as a result of the preapplication meeting regarding the need

to obtain a permit is binding on the department for 2 years from the date of the agreement.

324.30307. Permits; hearings; action on applications; local government ordinances; notice

Sec. 30307. (1) Within 60 days after receipt of the completed application and fee, the department may hold a hearing. If a hearing is held, it shall be held in the county where the wetland to which the permit is to apply is located. Notice of the hearing shall be made in the same manner as for the promulgation of rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The department may approve or disapprove a permit application without a public hearing unless a person requests a hearing in writing within 20 days after the mailing of notification of the permit application as required by subsection (3) or unless the department determines that the permit application is of significant impact so as to warrant a public hearing.

(2) The action taken by the department on a permit application under this part and part 13 [FN1] may be appealed pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. A property owner may, after exhaustion of administrative remedies, bring appropriate legal action in a court of competent jurisdiction.

(3) A person who desires notification of pending permit applications may make a written request to the department accompanied by an annual fee of $25.00, which shall be credited to the general fund of the state. The department shall prepare a biweekly list of the applications made during the previous 2 weeks and shall promptly mail copies of the list for the remainder of the calendar year to the persons who requested notice. The biweekly list shall state the name and address of each applicant, the location of the wetland in the proposed use or development, including the size of both the proposed use or development and of the wetland affected, and a summary statement of the purpose of the use or development.

(4) A local unit of government may regulate wetland within its boundaries, by ordinance, only as provided under this part. This subsection is supplemental to the existing authority of a local unit of government. An ordinance adopted by a local unit of government pursuant to this subsection shall comply with all of the following:

(a) The ordinance shall not provide a different definition of wetland than is provided in this part, except that a wetland ordinance may regulate wetland of less than 5 acres in size.

(b) If the ordinance regulates wetland that is smaller than 2 acres in size, the ordinance shall comply with section 30309. [FN2]

(c) The ordinance shall comply with sections 30308 and 30310. [FN3]

(d) The ordinance shall not require a permit for uses that are authorized without a permit under section 30305, [FN4] and shall otherwise comply with this part.

(5) Each local unit of government that adopts an ordinance regulating wetlands under subsection (4) shall notify the department.

(6) A local unit of government that adopts an ordinance regulating wetlands shall use an application form supplied by the department, and each person applying for a permit shall make application directly to the local unit of government. Upon receipt, the local unit of government shall forward a copy of each application along with any state fees that may have been submitted under section 30306 [FN5] to the department. The department shall begin reviewing the application as provided in this part. The local unit of government shall review the application pursuant to its ordinance and shall modify, approve, or deny the application within 90 days after receipt. If a local unit of government does not approve or disapprove the permit application within the time period provided by this

subsection, the permit application shall be considered approved, and the local unit of government shall be considered to have made the determinations as listed in section 30311. [FN6] The denial of a permit shall be accompanied by a written statement of all reasons for denial. The failure to supply complete information with a permit application may be reason for denial of a permit. If requested, the department shall inform a person whether or not a local unit of government has an ordinance regulating wetlands. If the department receives an application with respect to a wetland located in a local unit of government that has an ordinance regulating wetlands, the department immediately shall forward the application to the local unit of government, which shall modify, deny, or approve the application under this subsection. The local unit of government shall notify the department of its decision. The department shall proceed as provided in this part.

(7) If a local unit of government does not have an ordinance regulating wetlands, the department shall promptly send a copy of the permit application to the local unit of government where the wetland is located. The local unit of government may review the application; may hold a hearing on the application; may recommend approval, modification, or denial of the application to the department or may notify the department that the local unit of government declines to make a recommendation. The recommendation of the local unit of government, if any,

shall be made and returned to the department at any time within 45 days after the local unit of government's receipt of the permit application.

(8) In addition to the requirements of subsection (7), the department shall notify the local unit of government that the department has issued a permit under this part within the jurisdiction of that local unit of government within 15 days of issuance of the permit. The department shall enclose a copy of the permit with the notice.

[FN1] M.C.L.A. & 324.1301 et seq.

[FN2] M.C.L.A. § 324.30309.

[FN3] M.C.L.A. §§ 324.30308 and 324.30310.

[FN4] M.C.L.A. § 324.30305.

[FN5] M.C.L.A. § 324.30306.

[FN6] M.C.L.A. & 324.30311.

324.30308. Wetland ordinances: inventory maps; hearings on use applications

Sec. 30308. (1) Prior to the effective date of an ordinance authorized under section 30307(4), [FN1] a local unit of government that wishes to adopt such an ordinance shall complete and make available to the public at a reasonable

cost an inventory of all wetland within the local unit of government, except that a local unit of government located in a county that has a population of less than 100,000 is not required to include public lands on its map. A local unit of government shall make a draft of the inventory map available to the public, shall provide for public notice and comment opportunity prior to finalizing the inventory map, and shall respond in writing to written comments received by the local unit of government regarding the contents of the inventory. A local unit of government that has a wetland ordinance on December 18, 1992 has until June 18, 1994 to complete an inventory map and to otherwise comply with this part, or the local unit of government shall not continue to enforce that ordinance. Upon completion of an inventory map or upon a subsequent amendment of an inventory map, the local unit of government shall notify each record owner of property on the property tax roll of the local unit of government that the inventory maps exist or have been amended, where the maps may be reviewed, that the owner's property may be designated as a wetland on the inventory map, and that the local unit of government has an ordinance regulating wetland. The notice shall also inform the property owner that the inventory map does not necessarily include all of the wetlands within the local unit of government that may be subject to the wetland ordinance. The notice may be given by including the required information with the annual notice of the property owner's property tax assessment. A wetland inventory map

does not create any legally enforceable presumptions regarding whether property that is or is not included on the inventory map is or is not a wetland .

(2) A local unit of government that adopts a wetland ordinance shall process wetland use applications in a manner that ensures that the same entity makes decisions on site plans, plats, and related matters, and wetland determinations, and that the applicant is not required to submit to a hearing on the application before more than 1 local unit of government decision making body. This requirement does not apply to either of the following:

(a) A preliminary review by a planning department, planning consultant, or planning commission, prior to submittal to the decision making body if required by an ordinance.

(b) An appeal process that is provided for appeal to the legislative body or other body designated to hear appeals.

[FN1] M.C.L.A. § 324.30307(4).

324.30309. Wetland use permits for wetlands less than 2 acres in size, municipalities; disapproval; written findings

Sec. 30309. A local unit of government that has adopted an ordinance under section 30307(4) [FN1] that regulates wetland within its jurisdiction that is less than 2 acres in

size shall comply with this section. Upon application for a wetland use permit in a wetland that is less than 2 acres in size, the local unit of government shall approve the permit unless the local unit of government determines that the wetland is essential to the preservation of the natural resources of the local unit of government and provides these findings, in writing, to the permit applicant stating the reasons for this determination. In making this determination, the local unit of government must find that 1 or more of the following exist at the particular site:

(a) The site supports state or federal endangered or threatened plants, fish, or wildlife appearing on a list specified in section 36505. [FN2]

(b) The site represents what is identified as a locally rare or unique ecosystem.

(c) The site supports plants or animals of an identified local importance.

(d) The site provides groundwater recharge documented by a public agency.

(e) The site provides flood and storm control by the hydrologic absorption and storage capacity of the wetland.

(f) The site provides wildlife habitat by providing breeding, nesting, or feeding grounds or cover for forms of

wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.

(g) The site provides protection of subsurface water resources and provision of valuable watersheds and recharging groundwater supplies.

(h) The site provides pollution treatment by serving as a biological and chemical oxidation basin.

(i) The site provides erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(j) The site provides sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.

[FN1] M.C.L.A. & 324.30307(4}.

[FN2] M.C.L.A. § 324.36505.

324.30310. Municipal ordinances; denial of wetland use permits: request for revaluation of fair market value, judicial review; right to institute civil proceedings

Sec. 30310. (1) A local unit of government that adopts an ordinance authorized under section 30307 (4) [FN1] shall include in the ordinance a provision that allows a landowner to request a revaluation of the affected property for assessment purposes to determine its fair market value

under the use restriction if a permit is denied by a local unit of government for a proposed wetland use. A landowner who is aggrieved by a determination, action, or inaction under this subsection may protest and appeal that determination, action, or inaction pursuant to the general property tax act, Act No. 206 of the Public Acts of 1893, being sections 211.1 to 211.157 of the Michigan Compiled Laws.

(2) If a permit applicant is aggrieved by a determination, action, or inaction by the local unit of government regarding the issuance of a permit, that person may seek judicial review in the same manner as provided in the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) This section does not limit the right of a wetland owner to institute proceedings in any circuit of the circuit court of the state against any person when necessary to protect the wetland owner's rights.

[FN1] M.C.L.A. & 324.30307(4)

324.30311. Permits; criteria for approval

Sec. 30311. (1) A permit for an activity listed in section 30304 [FN1] shall not be approved unless the department

determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.

(2) In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity. The decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction. The following general criteria shall be considered:

(a) The relative extent of the public and private need for the proposed activity.

(b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

(c) The extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

(d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities in the watershed.

(e) The probable impact on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.

(f) The size of the wetland being considered.

(g) The amount of remaining wetland in the general area.

(h) Proximity to any waterway.

(i) Economic value, both public and private, of the proposed land change to the general area.

(3) In considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies.

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 [FN2] and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) A feasible and prudent alternative does not exist.

[FN1] M.C.L.A. § 324.30304.

[FN2] M.C.L.A. & 324.30302.

324.30312. General permits: issuance

Sec. 30312. (1) The department, after notice and opportunity for a public hearing, may issue general permits on a statewide basis or within a local unit of government for a category of activities if the department determines that the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. A general permit issued under this subsection shall be based on the requirements of this part and the rules promulgated under this part, and shall set forth the requirements and standards that shall apply to an activity authorized by the general permit.

(2) The department may impose conditions on a permit for a use or development if the conditions are designed to remove an impairment to the wetland benefits, to mitigate the impact of a discharge of fill material, or to otherwise improve the water quality.

(3) The department may establish a reasonable time when the construction, development, or use is to be completed or

terminated. A general permit shall not be valid for more than 5 years.

(4) A general permit under this section may be issued for the mowing of vegetation or the removal of vegetation in the area between the ordinary high-water mark and the water's edge. An application under this subsection may be submitted by a local unit of government on behalf of property owners within its jurisdiction or by 1 or more adjacent property owners for riparian property located within the same county.

324.30313. Revocation or modification of general permits

Sec. 30313. (1) A general permit may be revoked or modified if, after opportunity for a public hearing or a contested case hearing under the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, the department determines that the activities authorized by the general permit have an adverse impact on the environment or the activities would be more appropriately authorized by an individual permit.

(2) A permit may be terminated or modified for cause, including:

(a) A violation of a condition of the permit.

(b) Obtaining a permit by misrepresentation or failure to fully disclose relevant facts.

(c) A change in a condition that requires a temporary or permanent change in the activity.

324.30313b. Minor revisions to permits; prerequisites for making; time for approval or denial of request; fee; minor revision defined

Sec. 30313b. (1) The department may make minor revisions in a permit issued under this part if all of the following apply:

(a) The project is in compliance with the permit and this part.

(b) The minor revisions are requested by the permittee in writing.

(c) The request is accompanied by a fee of $250.00.

(d) If the request is for a transfer of the permit, the request is accompanied by a written agreement between the current and new owners or operators containing a specific date for transfer of responsibility, coverage, and liability under the permit.

(2) The department shall approve or deny the request within 20 business days. However, if the only minor revision requested is a transfer under subsection (4)(a), the department shall approve or deny the request within 10 business days. If the department fails to approve or deny the request within the time required by this subsection, the department shall refund the fee.

(3) If the department determines that none of the changes requested are minor revisions, the department shall retain the fee but the permittee may apply the fee toward a new permit for a project at that site.

(4) As used in this section, "minor revision" means either of the following with respect to a permit issued under this part:

(a) A transfer.

(b) A revision that does not increase the overall impact of a project on wetlands and that is within the scope of the project as described in the original permit.

324.30314. Information required to be furnished; entry upon premises

Sec. 30314. (1) The department shall require the holder of a permit to provide information the department reasonably requires to obtain compliance with this part.

(2) Upon reasonable cause or obtaining a search warrant, the department may enter on, upon, or through the premises on which an activity listed in section 30304 [FN1] is located or on which information required to be maintained under subsection (1) is located.

[FN1] M.C.L.A. § 324.30304.

324.30315. Violations; order for compliance; civil actions

Sec. 30315. (1) If, on the basis of information available to the department, the department finds that a person is in violation of this part or a condition set forth in a permit issued under section 30311 or 30312, [FN1] the department shall issue an order requiring the person to comply with the prohibitions or conditions or the department shall request the attorney general to bring a civil action under section 30316(1). [FN2]

(2) An order issued under subsection (1) shall state with reasonable specificity the nature of the violation and shall specify a time for compliance, not to exceed 30 days, which the department determines is reasonable, taking into account the seriousness of the violation and good faith efforts to comply with applicable requirements.

[FN1] M.C.L.A. § 324.30311 or 324.30312.

[FN2] M.C.L.A. § 324.30316(l}.

324.30316. Civil actions by attorney general; fines and penalties

Sec. 30316. (1) The attorney general may commence a civil action for appropriate relief, including injunctive relief upon request of the department under section 30315(1). [FN1] An action under this subsection may be brought in the circuit court for the county of Ingham or for a county in which the defendant is located, resides, or is doing business. The court has jurisdiction to restrain the violation and to require compliance with this part. In addition to any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation. A person who violates an order of the court is subject to a civil fine not to exceed $10,000.00 for each day of violation.

(2) A person who violates this part is guilty of a misdemeanor, punishable by a fine of not more than $2,500.00.

(3) A person who willfully or recklessly violates a condition or limitation in a permit issued by the department under this part, or a corporate officer who has knowledge of or is responsible for a violation, is guilty of a misdemeanor, punishable by a fine of not less than $2,500.00 nor more than $25,000.00 per day of violation, or by imprisonment for not more than 1 year, or both. A person who violates this section a second or subsequent

time is guilty of a felony, punishable by a fine of not more than $50,000.00 for each day of violation, or by imprisonment for not more than 2 years, or both.

(4) In addition to the penalties provided under subsections (1), (2), and (3), the court may order a person who violates this part to restore as nearly as pOSSible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.

[FN1] M.C.L.A. 9 324.30315(1).

324.30317. Fees and civil fines; deposit in general fund; exceptions, deposit in the land and water management permit fee fund

Sec. 30317. The civil fines collected under this part shall be forwarded to the state treasurer for deposit in the general fund of the state. The fees collected under this part shall be deposited in the land and water management permit fee fund created in section 30113. [FN1] Subject to section 30113, the department shall expend money from the land and water management permit fee fund, upon appropriation, to support gUidance for property owners and applicants, permit processing, compliance inspections, and enforcement activities under this part. Not more than 90 days after the end of each state fiscal year ending after

1997, the department shall prepare a report describing how money from the land and water management permit fee fund was expended during that fiscal year and an evaluation of the current statutory and department rules, bulletins, and letters definition of a wetland and any appropriate changes to that definition in the first report submitted to the legislature under this section and shall submit the report to the standing committees of the house of representatives and the senate that primarily address issues pertaining to the protection of natural resources and the environment, and the appropriations committees in the house of representatives and the senate. Other than civil fines and costs, the disposition of which is governed by section 8379 of the revised judicature act of 1961 1961 PA 236, MCL 600.8379, or criminal fines, funds collected by a local unit of government under an ordinance authorized under section 30307(4) shall be deposited in the general fund of the local unit of government.

[FN1] M.C.L.A. § 324.30113.

324.30318. Revaluation of property

Sec. 30318. If a permit is denied for a proposed wetland activity, the landowner may request a revaluation of the affected property for assessment purposes to determine its fair market value under the use restriction.

324.30319. Rules; hearings; judicial review

Sec. 30319. (1) The department shall promulgate and enforce rules to implement this part.

(2) If a person is aggrieved by any action or inaction of the department, the person may request a formal hearing on the matter involved. The hearing shall be conducted by the department pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) A determination, action, or inaction by the department following the hearing is subject to judicial review as provided in Act No. 306 of the Public Acts of 1969.

(4) This section does not limit the right of a wetland owner to institute proceedings in any circuit of the circuit court of the state against any person when necessary to protect the wetland owner's rights.

324.30320. Inventories of wetlands; maps, surveys

Sec. 30320. (1) As inventories of wetland are completed, the inventories shall be used as 1 of the criteria by the department in issuing permits. The inventories shall be periodically updated. The maps, ground surveys, and descriptions of wetlands included in the inventories shall be

submitted to the respective county register of deeds and shall become a public document available to review by any member of the public.

(2) Aerial photographs and satellite telemetry data reproductions shall be made available to the respective county register of deeds for cost as determined by the department.

324.30321. Preliminary inventory of wetlands; hearings; wetland assessment, requirements; written assessment reports, contents; request for reassessment; fees

Sec. 30321. (1) The department shall make or cause to be made a preliminary inventory of all wetland in this state on a county by county basis and file the inventory with the agricultural extension office, register of deeds, and county clerk.

(2) At least 2 hearings shall be held in each state planning and development region created by Executive Directive No. 1973-1. The hearing shall be held by the department after publication and due notice so that interested parties may comment on the inventory. After the hearings, the department shall issue a final inventory which shall be sent and kept by the agricultural extension office, register of deeds, and county clerk. Legislators shall receive an inventory of a county or regional classification for their

districts including both preliminary and final inventories unless the legislators request not to receive the materials.

(3) Before an inventory is made of a county, a person who owns or leases a parcel of property located in that county may request that the department of environmental quality assess whether the parcel of property or a portion of the parcel is wetland. The request shall satisfy all of the following requirements:

(a) Be made on a form provided by the department.

(b) Be signed by the person who owns or leases the property.

(c) Contain a legal description of the parcel and, if only a portion of the parcel is to be assessed, a description of the portion to be assessed.

(d) Include a map showing the location of the parcel.

(e) Grant the department or its agent permission to enter on the parcel for the purpose of conducting the assessment.

(4) The department shall assess the parcel within a reasonable time after the request is made. The department may enter upon the parcel to conduct the assessment. Upon completion of the assessment, the department shall provide

the person with a written assessment report. The assessment report shall do all of the following:

(a) Identify in detail the location of any wetland in the area assessed.

(b) If wetland is present in the area assessed, describe the types of activities that require a permit under this part.

(c) If the assessment report determines that the area assessed or part of the area assessed is not wetland, state that the department lacks jurisdiction under this part as to the area that the report determines is not wetland and that this determination is binding on the department for 3 years from the date of the assessment.

(d) Contain the date of the assessment.

(e) Advise that the person may request the department to reassess the parcel or any part of the parcel that the person believes was erroneously determined to be wetland if the request is accompanied by evidence pertaining to wetland vegetation, soils, or hydrology that is different from or in addition to the information relied upon by the department.

(f) Advise that the assessment report does not constitute a determination of wetland that may be regulated under local ordinance or wetland areas that may be

regulated under federal law and advise how a determination of wetland areas regulated under federal law may be obtained.

(g) List regulatory programs that may limit land use activities on the parcel, advise that the list is not exhaustive, and advise that the assessment report does not constitute a determination of jurisdiction under those programs. The regulatory programs listed shall be those under the following parts:

(i) Part 31, [FN1] with respect to floodplains and floodways.

(ii) Part 91. [FN2]

(iii) Part 301. [FN3]

(iv) Part 323. [FN4]

(v) Part 325. [FN5]

(vi) Part 353. [FN6]

(5) A person may request the department to reassess any area assessed under subsections (3) and (4) that the person believes the department erroneously determined to be wetland. The requirements of subsections (3) and (4) apply to the request, assessment, and assessment report. However, the request shall be accompanied by evidence

pertaining to wetland vegetation, soils, or hydrology that is different from or in addition to the information relied upon by the department. The assessment report shall not contain the information required by subsection (4)(e).

(6) If an assessment report determines that the area assessed or part of the area assessed is not a wetland regulated by the department under this part, then the area determined by the assessment report not to be a wetland is not a wetland regulated by the department under this part for a period of 3 years after the date of the assessment.

(7) The department may charge a fee for an assessment requested under subsection (3) based upon the cost to the department of conducting an assessment.

[FN1] M.C.L.A. § 324.3101 et seq.

[FN2] M.C.L.A. § 324.9101 et seq.

[FN3] M.C.L.A. q 324.30101 et seq.

[FN4] M.C.L.A. § 324.32301 et seq.

[FN5] M.C.L.A. q 324.32501 et seq.

[FN6] M.C.L.A. § 324.35301 et seq.

324.30322. Notice to property owners of change in status

Sec. 30322. As wetland inventories are completed as specified in section 30321, [FN1] owners of record as identified by the current property tax roll shall be notified of the pOSSible change in the status of their property. Notification shall be printed on the next property tax bill mailed to property owners in the county. It shall contain information specifying that a wetland inventory has been completed and is on file with the agricultural extension office, register of deeds, and county clerk, and that property owners may be subject to regulation under this part.

[FN1] M.C.L.A. § 324.30321.

324.30323. Taking without compensation

Sec. 30323. (1) This part shall not be construed to abrogate rights or authority otherwise provided by law.

(2) For the purposes of determining if there has been a taking of property without just compensation under state law, an owner of property who has sought and been denied a permit from the state or from a local unit of government that adopts an ordinance pursuant to section 30307(4), [FN1] who has been made subject to modifications or conditions in the permit under this part, or who has been made subject to the action or inaction of the department pursuant to this part or the action or inaction of a local unit

of government that adopts an ordinance pursuant to section 30307(4) may file an action in a court of competent jurisdiction.

(3) If the court determines that an action of the department or a local unit of government pursuant to this part or an ordinance authorized pursuant to section 30307(4) constitutes a taking of the property of a person, then the court shall order the department or the local unit of government, at the department's or the local unit of government's option, as applicable, to do 1 or more of the following:

(a) Compensate the property owner for the full amount of the lost value.

(b) Purchase the property in the public interest as determined before its value was affected by this part or the local ordinance authorized under section 30307(4) or the action or inaction of the department pursuant to this part or the local unit of government pursuant to its ordinance.

(c) Modify its action or inaction with respect to the property so as to minimize the detrimental affect to the property's value.

(4) For the purposes of this section, the value of the property may not exceed that share of the state equalized valuation of the total parcel that the area in dispute

occupies of the total parcel of land, multiplied by 2, as determined by an inspection of the most recent assessment roll of the township or city in which the parcel is located.

[FN1] M.C.L.A. § 324.30307(40).

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Nº. 06-1071

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

K&K CONSTRUCTION, INC., AND J.F.K. INVESTMENT COMPANY, L.L.C.,
Petitioners,

v.

THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND STATE OF MICHIGAN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR REHEARING

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ARGUMENTS SUPPORTING PETITION FOR REHEARING

I. The Michigan Court of Appeals' Opinion Wholly Contradicts this Court's Opinion in *Penn Central* and Its Progeny Including *Lingle v. Chevron*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d. 876 (2005) Thereby Destroying Forever the *Penn Central* Balancing Test In Michigan As Well As Interim Regulatory Taking Relief Under First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Pursuant to Rule 44, any petition for rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. **(Rule 44)** On April 2, 2007, this Court issued an Order denying the Petitioners, K&K Construction, Inc. and J.F.K. Investment Company, L.L.C.s' ("Petitioners"), Petition for A Writ of Certiorari. The Petitioners now seek this Petition for Rehearing.

Here, the Petitioners' Petition for A Writ of Certiorari was mailed to this Court on January 29, 2007. On January 31, 2007, the United States Court of Federal Claims issued its Opinion in **CCA Associates** v. **United States**, 75 Fed. Cl. 170 (2007). Although not binding, **CCA** again amplifies the existing murkiness in takings law and further confirms the need for this Court to bring clarity to this fundamental constitutional issue. In **CCA**, a

Louisiana partnership owned an apartment complex in Metairie, Louisiana. The **CCA** plaintiff argued that the United States affected a temporary taking of its property without just compensation. The **CCA** plaintiff asserted that the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA" or "Title II") (codified at 12 U.S.C. § 1715 *l* note) and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, 104 Stat. 4249 ("LIHPRHA" or "Title VI") stripped the partnership of its contractual right to prepay its mortgage and exit the low-income housing program.

> "Plaintiff, CCA Associates ("CCA"), is a Louisiana partnership that owns an apartment complex in Metairie, Louisiana. CCA claims that the United States ***172** effected a temporary taking of its property without just compensation in contravention of the Fifth Amendment of the United States Constitution. Specifically, CCA avers that the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA" or "Title II") (codified at 12 U.S.C. § 1715 *l* note) and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, 104 Stat. 4249 ("LIHPRHA" or "Title VI") (codified in scattered sections of Title 12 of the

> U.S.Code, including 12 U.S.C. §§ 4101 to 4124), stripped the partnership of its contractual right to prepay its mortgage and thereby to exit the low-income housing program under which it was operating and begin to operate the apartment complex on a conventional basis." (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 171-172 (2007).)

The **CCA** court started its ruling by stating that the first factor in **Penn Central Transportation Company** v. **New York City**, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), character of the governmental action, requires a reviewing court to consider the purpose and importance of the public interest reflected in the regulatory imposition and balance the liberty interest of the private property owner against the governments need to protect the public interest.

> "In analyzing the first of the *Penn Central* factors, the character of the governmental action, a court **must** "consider the purpose and importance of the public interest reflected in the regulatory imposition[, and] **balance the liberty interest of the private property owner against the [g]overnment's need to protect the public interest through imposition of the restraint**." *Cienega VIII*, 331 F.3d at 1337-38 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (1994))."

(**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

The **CCA** court stated that this analysis focuses on the intended benefits of the governmental action and on whether the burdens imposed are borne disproportionately by relatively few property owners.

> " **This analysis focuses not only on the intended benefits of the governmental action, but also on whether the burdens the action imposed were borne disproportionately by relatively few property owners** *Cienega VIII*, 331 F.3d at 1338-40; *see also Armstrong*, 364 U.S. at 49, 80 S.Ct. 1563; *Cienega IX*, 67 Fed.Cl. at 466."(**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

In support of this statement of the law, the **CCA** court relied in part on this Court's ruling in **Armstrong** *v.* **United States**, 364 U.S. 40, 49, 80 S.Ct 1563, 4 L.Ed.2d 1554 (1960).

In **CCA**, the public benefit was ensuring subsidized housing for poor families.

> "The government argues that the preservation statutes did not have the character of a taking because they promoted **an important governmental objective-ensuring that subsidized housing remained in place for thousands of poor**

> **families**. Def.'s Br. at 46-48. The government also avers that the preservation statutes did not institute improper burden-shifting because they offered owners alternatives such as a HUD-approved sale and financial incentives to remain in the HUD programs. *Id.* at 48-49." (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

The **CCA** plaintiff, however, argued that the preservation statute disproportionately imposed the burden of maintaining low income housing on the **CCA** plaintiff and other owners of subsidized low income housing:

> "**CCA counters that the preservation statutes disproportionately imposed the burden of maintaining low-income housing on CCA** and other owners of subsidized low-income housing. Pl.'s Br. at 38-39." (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

The **CCA** court ruled that the character of the government's action was a temporary taking of a property interest with the government acting in furtherance of a public purpose to benefit those in need of low income housing. However, the **CCA** court ruled that the burden was placed disproportionately on a few private property owners.

"The character of the government's action is that of a taking of a property interest, albeit temporarily.... **Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners.**" (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

* * *

"Congress' objective in passing ELIHPA and LIHPRHA-preserving low-income housing-and method-forcing some owners to keep accepting below-market rents-is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program." ."(**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).)

The ruling in **CCA** provides the requisite legal foresight to guide legal practitioners throughout the country

on the present dubious effectiveness of the Fifth Amendment of the United States Constitution and each state's parroting the same in their respective constitutions offering presently perplexing myriad of interpretations. The **CCA** court focused on the intended benefits of the governmental action and on whether the burdens imposed are borne disproportionately by relatively few property owners.

Here, the Michigan Court of Appeals ruled that the wetland regulation serves an important public interest and is widespread. However, the Michigan Court of Appeals ruled that, **in order to demonstrate a regulatory takings claim**, a plaintiff in Michigan must now prove that the economic impact and the extent to which the regulation has interfered with distinct investment backed expectations are the functional equivalent of an actual physical invasion of the property. This is now the current law in Michigan and it represents the utter destruction of **Penn Central**.

If presented with the facts in **CCA**, the Michigan Court of Appeals would likely have found a public interest being served – housing for poor families – with widespread application and by simple fiat, as in the K&K case, deny Fifth Amendment remedies altogether. The Michigan Court of Appeals would simply rule that the **CCA** plaintiff cannot show that the economic impact and the extent to which the regulation has interfered with distinct investment backed expectations are the functional equivalent of a physical invasion as a matter of law, ipso facto. Herein is the problem and the birth of a hydra headed fictionalized

concept, Average Reciprocity of Advantage, forever destroying the realistic application of the Fifth Amendment which has no reciprocity, in fact, to the individual burdened with the *widespread* public good. Because there was no physical invasion in **CCA** and nothing rising to the functional equivalent of a physical invasion, the Michigan Court of Appeals would now -- without any balancing at all -- reject any taking, including any **Penn Central** analysis in the stroke of a pen.

The Michigan Court of Appeals and the **CCA** court both start by applying the **Penn Central** balancing test with its attendant progeny. However, the results are just the opposite. This divergence demonstrates how unsettled this area of takings law is and serves as a clarion call to this Court to offer firm resolution and breathe legal life back into the Fifth Amendment.

The Petitioners here have suffered a uniquely felt multi-million dollar loss which is not offset by any benefits flowing from the preservation of other wetlands. Here, the Petitioners have investment backed expectations that are clearly frustrated by the regulation. Here, the denial of the right to develop parcel 1 frustrated recoupment of investment in the entire parcel by denying any return to the Petitioners and by the Michigan DNR never issuing any valid permit until 12 years later, without defining or delineating the wetlands, effectively denied use of the uplands as well.

The frustration of the investment backed expectation and the uncontroverted practical total

diminution in the value of the land clearly demonstrate a taking. The Michigan Court of Claims came to the right ruling and the Michigan Court of Appeals erred when it reversed by irreverently sounding forever the death knell to the **Penn Central** balancing test and the efficacy of the Fifth Amendment in Michigan.[1]

CONCLUSION

The Michigan Court of Appeals' edict of its own Average Reciprocity of Advantage has effectively eliminated a rational context for any and all empirical analysis of the character of government action prong of the **Penn Central** balancing test destroying any and all remedies under the Fifth Amendment by the individual who bears the brunt of public good on his or her shoulders. The Michigan Court of Appeals improperly analogizes wetlands regulations to general zoning in a syllogistically flawed way. While zoning regulations may apply to everyone in the area zoned, wetlands are functions of nature and are not distributed in such a way to syllogistically assure equal burden among landowners. Here, the Petitioners are singled out in the most onerous way to bear the burden

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[1] As this Court ruled in **First English** with regard to the Fifth Amendment :

> "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. (**First English**, 482 U.S. at p. 314.)

alone of providing public good benefits to the public at large. An unconscionable burden the Fifth Amendment was intended to assuage.

For the reasons stated above, the Petitioners respectfully request that this Court grant the Petition for Rehearing and grant Petitioners their previously submitted Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATION UNDER RULE 44

Attorney Robert L. Bunting certifies that pursuant to Rule 44, the grounds for this Petition for Rehearing are restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the Petition for Writ of Certiorari and that this Petition for Rehearing is presented in good faith and not for delay.

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